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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 260. 24

G. D. NEWHALL, APPELLANT,

vs.

E. J. LE BRETON, ADMINISTRATOR OF THE ESTATE OF THEODORE LE ROY, DECEASED, VICTOR LE ROY, GEORGES LE ROY, AND EUGENE LE ROY, HEIRS-AT-LAW OF THEODORE LE ROY, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED AUGUST 17, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 260.

G. D. NEWHALL, APPELLANT,

vs.

E. J. LE BRETON, ADMINISTRATOR OF THE ESTATE OF THEODORE LE ROY, DECEASED, VICTOR LE ROY, GEORGES LE ROY, AND EUGENE LE ROY, HEIRS-AT-LAW OF THEODORE LE ROY, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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a UNITED STATES OF AMERICA, *ss:*

To E. J. Le Breton, administrator of the estate of Theodore Le Roy, deceased; Victor Le Roy, Georges Le Roy, and Eugene Le Roy, heirs-at-law of Theodore Le Roy, deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1883, pursuant to an order allowing an appeal to said Supreme Court made and entered in the circuit court of the United States for the district of California on the 29th day of January, 1883, wherein G. D. Newhall is appellant and E. J. Le Breton, administrator of the estate of Theodore Le Roy, deceased; Victor Le Roy, Georges Le Roy, and Eugene Le Roy, heirs-at-law of Theodore Le-Roy, deceased, are appellees, to show cause, if any there be, why the decree in the said order allowing appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 29th day of March, A. D. 1883, and of the Independence of the United States the 107th.

[The Seal of the Circuit Court, District of Cal'a.]

LORENZO SAWYER,
U. S. Circuit Judge.

b [Endorsed:] United States Supreme Court. G. D. Newhall, appellant, *vs.* E. J. Le Breton, &c., appellees. Citation. Due service and receipt of a copy of within citation admitted this 4th day of April, 1883. B. W. Brooks, solicitor for appellees. [In red ink:] Filed April 4th, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

1 *Complaint.*

In the Superior Court of the State of California in and for the City and County of San Francisco.

G. D. NEWHALL, Plaintiff, *vs.* THEODORE LE ROY, Defendant.

The plaintiff complains of the defendants and shows that on or about the first day of October, A. D. 1870, Juana M. Estudillo, Jose Ramon Estudillo, Jose Antonio Estudillo, Jose Vicente Estudillo, Luis D. Estudillo, Jesus Maria Estudillo, Magdalena E. Nugent, and John Nugent were indebted to the defendant, Le Roy, in the sum of three hundred and ninety-seven thousand eight hundred and forty-nine dollars ($397,849.00), and the said parties were indebted to W. H. Patterson in the sum of thirteen thousand dollars ($13,000.00), and to S. M. Wilson and A. P. Crittenden in the sum of thirteen thousand dollars ($13,000), and to John B. Felton in the sum of
2 twenty-three thousand dollars ($23,000.00), making in all the sum of forty-nine thousand dollars ($49,000.00), and the said

forty-nine thousand dollars added to the said sum due the defendant, Le Roy, made the sum of four hundred and forty-six thousand eight hundred and forty-nine dollars ($446,849.00), gold coin of the United States, and the said Estudillos and Nugents agreed on said day to give to defendant, Le Roy, a deed for certain tracts or parcels of land and other property, and to pay to the parties to whom they were indebted the said sums, with interest thereon at one and a quarter per cent. per month until paid, and to give a deed of trust for certain property to secure the payment thereof to the defendant, Le Roy; and the plaintiff further shows that, in conformity with said agreement, the said parties did execute and deliver to the defendant, Theodore Le Roy, a deed, as follows:

3 This indenture, made the first day of October, A. D. one thousand eight hundred and seventy, between Juana M. Estudillo, Jose Ramon Estudillo, Jose Antonio Estudillo, Jose Vicente Estudillo, Luis D. Estudillo, Jesus Maria Estudillo, Magdalena E. Nugent, and John Nugent, parties of the first part, and Theodore Le Roy, party of the second part, witnesseth: Whereas the said parties of the first part are indebted to the said party of the second part in the sum of four hundred and forty-six thousand eight hundred and forty-nine dollars, gold coin of the United States, on which said sum the said parties of the first part have agreed to pay to the said party of the second part interest at the rate of one and one-quarter per cent. per month, payable in like gold coin, which said sum has been advanced by the said party of the second part to the said parties of

4 the first part on the agreements, undertakings, and conditions hereinafter set forth, and in which said sum is included the sum of two hundred and eighteen thousand three hundred and seventy-two twelve one-hundredths dollars, in gold coin, due by one John B. Ward to the Hibernia Bank, the payment of which the said party of the second part has assumed at the request of the said parties of the first part, and with the undertaking and agreement that said assumption shall be regarded as an advance at the date thereof of so much money by the said party of the second part to the said parties of the first part; and whereas the said parties of the first part have by this instrument conveyed and sold to the said party of the second part, his heirs, executors, and assigns, the real estate and personal property hereinafter described, and have agreed with the said party of the second part that he shall be clothed with the full powers of ownership of said real estate and personal property until, by the sale thereof, said indebtedness is fully paid,

5 or until the said indebtedness is otherwise fully paid by the said parties of the first part to the said party of the second part; and whereas the said parties of the first part have agreed that the said party of the second part shall have the irrevocable power, without recourse to law, to pay and reimburse himself the whole of his said indebtedness, principal and interest, out of the sales made by him of said real estate and personal property, and shall have full management, control, and disposition of the said real and personal estate as if the same belonged to him in full ownership:

Now, therefore, this indenture witnesseth that the said parties of

the first part, for and in consideration of the advances made to them as above set forth, simultaneously with the execution of this instrument, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain,
6 sell, alien, remise, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, all those certain tracts of land or properties known as the Rancho "San Leandro," in Alameda county, State of California, being the same rancho heretofore granted by the Mexican government to Jose Joaquin Estudillo.

Also that certain rancho or tract of land situated in the county of Santa Barbara, State of California, known as the "Guadalupe rancho," being the same land which was granted to Diego Olivera and Teodoro Arellanes by the Mexican government.

Also that certain rancho or tract of land situated in the county of Santo Barbara, State of California, and known as the "Cosmalia rancho," being the same land which was granted to Antonio Olivera by the Mexican government.

Also those certain pieces or parcels of swamp and overflowed lands situate in the county of Alameda, State of California,
7 viz., that certain piece described in the field notes of survey No. 208, swamp and overflowed lands, Alameda county, containing $129\frac{80}{100}$ acres, being the same lands conveyed by deed bearing date May 6th, 1867, made and executed by M. A. Bacon to John B. Ward, and by said Ward this day conveyed to said parties of the first part.

Also that certain other piece described in survey No. 223, swamp and overflowed lands, containing 207.09 acres, being the same lands conveyed by deed bearing date September 6th, 1867, made and executed by D. B. Mann to John B. Ward, and by said Ward this day conveyed to said parties of the first part, excepting, however, out of the above-described "San Leandro rancho" and from the operation of this deed the piece or parcel of land described as follows:

Beginning at the southeast corner of Oscar Lewis' tract, and on the north side of Ward avenue; thence easterly to the end of Ward avenue; thence along the east side of the county road here-
8 tofore surveyed to the Redwoods; thence to the centre of San Leandro creek; thence northerly along the said creek; thence westerly along the centre of said creek to the northwest corner of Oscar Lewis' tract; thence along said Lewis' tract to the place of beginning.

Also all the personal property of every kind and nature in the said real estate above described, and all personal property of whatever kind and nature in the hands of L. L. Robinson, receiver in the suit of Juana M. Estudillo *et al. vs.* John B. Ward *et al.*, in the district court of the third judicial district, excepting therefrom certain personal property belonging to Charles H. Cushing and wife, enumerated in the answer of said Cushing and wife in said action.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the revision and revisions, remainder and remainders, rents, issues,

and profits thereof, and also all the estate, right, title, interest,
9 property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the above-described premises and every part and parcel thereof, with the appurtenances, to have and to hold all and singular the above mentioned and described premises, less the portion thereof hereinabove excepted, unto the said party of the second part, his heirs and assigns, forever, upon and for the purpose of executing the following trusts, to wit:

First. To keep insured to a reasonable amount against loss by fire all buildings and improvements on said premises, if the said party of the second part shall deem best.

Second. To pay all taxes imposed thereon and all assessments and liens.

Third. To sell the same or any parts or parcels thereof for cash or for part cash and on credit at public or private sale, with or without notice to the said parties of the first part, it being understood
10 that said Le Roy may sell, discount, and dispose of all or any notes, mortgages, or securities taken for deferred payments, at his discretion; also to lease the same in parcels or as a whole.

Fourth. To pay off the said indebtedness hereinabove specified, with the interest thereon, and all sums which may hereafter be advanced by the said party of the second part to the said parties of the first part, or any or either of them, or at the request of any or either of them; also all taxes, liens, or other incumbrances, costs of lawsuits, and counsel fees, and other expenses of litigation spent in and about the protection of the title of the said property, it being understood that all advances made by the said party of the second part to the said parties of the first part, or any or either of them, shall bear interest from the date of the advance at the rate of one and one-quarter per cent. per month.

Fifth. To retain as commissions two and one-half per cent.
11 of the gross amounts of all sales made by the said party of the second part.

Sixth. After all of the above payments, expenditures, and advances, with interest, as above provided, shall be paid, then said Le Roy shall reconvey to the grantors above named, in proportion to their respective interests as claimed to be held by them immediately prior to the execution hereof, and shall account to them or pay over to them all surplus moneys received from sales, and transfer to them all securities for deferred payments.

Seventh. This trust may be terminated as to all unsold portions of said property, and said parties of the first part shall be entitled to a reconveyance on payment of all the sums of money hereinbefore provided to be paid; and said parties of the first part may make payment of the whole or any part of said indebtedness at any time.

Eighth. The said party of the second part shall receive commissions on all sales at the rate of two and one-half per centum on

the dollar, such commissions, however, not to be deducted or
12 charged until all payments above mentioned are made.

Ninth. The trust hereby created is a continuing and subsisting trust until the whole of the indebtedness hereinabove specified is paid, and it shall not be necessary for the said party of the second part to bring any suit on said indebtedness to stop the statutes of limitations from running. It is also understood and agreed between the parties hereto that a release this day made to John B. Ward, Sophia Juana Ward, and John Francis Ward, and Charles H. Cushing and Dolores, his wife, of three hundred acres of land, in the San Leandro ranch, was made with the full consent and at the request of the parties of the first part.

It is also understood that the said Juana M. Estudillo may have the right to cause the building and block now occupied by her as a residence to be reconveyed to her by the said Le Roy on the payment by her to him of the sum of eight thousand one hun-
13 dred dollars in gold coin, with interest at the rate of one and one-quarter per cent. per month in gold coin. This provision, however, is not to change in any respect the powers of the said Le Roy, hereinabove given.

It is further understood that the said Le Roy shall have the right out of the proceeds of said property, as aforesaid, to pay any sum that may be awarded to L. L. Robinson by the court of the third judicial district for services as receiver in the action of Juana M. Estudillo *et al. vs.* John B. Ward *et als.*, after paying the indebtedness hereinabove specified.

It is further understood that a certain deed made and executed by John B. Ward, Juana Sophia Ward, John Francis Ward, Charles H. Cushing, and Dolores Cushing, and Juana M. Estudillo was made with the full consent of the said parties of the first part, and that the interest so conveyed is vested in the said Le Roy by this indenture.

14 It is further understood that the said Le Roy, in executing the trusts aforesaid, shall only be responsible for acts of bad faith by him committed.

It is further understood that the said Le Roy will not sell the two blocks of land and the house constituting the residence of the said Juana M. Estudillo until he shall have sold all the other property conveyed to him in this instrument.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JUANA M. ESTUDILLO. [SEAL.]
JOSE R. ESTUDILLO. [SEAL.]
JOSE A. ESTUDILLO. [SEAL.]
JOSE VICENTE ESTUDILLO. [SEAL.]
LUIS D. ESTUDILLO. [SEAL.]
JESUS MARIA ESTUDILLO. [SEAL.]
MAGDALENA ESTUDILLO NUGENT. [SEAL.]
J. M. NUGENT. [SEAL.]

Signed, sealed, and delivered in presence of—
JAMES G. CARSON.

And the plaintiff shows that the said amounts due to said
15 Patterson, Wilson, Crittenden, and Felton, amounting to forty-nine thousand dollars, were included in said sum of four hundred and forty-six thousand eight hundred and forty-nine dollars.

And the plaintiff further shows that the defendant, Theodore Le Roy, accepted said deed, and thereby became and was a trustee for the said William H. Patterson in the sum of thirteen thousand dollars, and for the said S. M. Wilson and A. P. Crittenden in the sum of thirteen thousand dollars, and for the said J. B. Felton in the sum of twenty-three thousand dollars; and the said Le Roy entered into possession of all the real estate therein mentioned, and has ever since held the possession thereof, and is now in possession thereof; that all of the personal property therein mentioned has been received by said Theodore Le Roy, and he has realized large sums therefrom, but the amount is unknown to the plaintiff; that said Le Roy has realized large sums of money from the use
16 and sale of said real estate and from the sale of the personal property, but the amount thereof is unknown to the plaintiff.

And the plaintiff further shows that on or about the 26th day of September, A. D. 1874, the defendant, Theodore Le Roy, commenced an action in the district court of the third judicial district of the State of California in and for the county of Alameda against the said Estudillos and Nugents to foreclose the lien upon said property and to have all the said property sold to pay what was due that all of the defendants appeared therein and filed their answer, and issue was joined therein, and such proceedings were thereupon had that afterwards, on the tenth day of January, 1879, a judgment was rendered in said court, in which it was adjudged that there was due to the plaintiff therein, who was the Theodore Le Roy, the defendant herein, under the deed of trust hereinbefore set forth, the sum of seven hundred and sixty-eight thousand and seventy-seven
17 dollars ($768.077.00), and that said sum should bear interest from the date thereof at seven per cent. per annum, and it was further ordered, adjudged, and decreed that all the property described in said deed of trust should be sold to pay said amount found to be due.

And the plaintiff further shows that the amount due to the said Patterson and included in said judgment was thirty-two thousand dollars ($32,000.00), and the amount due to said Wilson and Crittenden and included in said judgment was thirty-two thousand dollars ($32,000.00).

And the plaintiff shows that under and by virtue of said judgment a sale took place, and the plaintiff therein and the defendant herein purchased the following-described property:

All those certain tracts of land or properties known as the "Rancho San Leandro," in Alameda county, State of California, being the same rancho heretofore granted by the Mexican government to Jose Joaquin Estudillo.

18 Also that certain rancho or tract of land situated in the county of Santa Barbara, State of California, known as the

"Guadalupe rancho," being the same land which was granted to Diego Olivera and Teodoro Arellanes by the Mexican government.

Also that certain rancho or tract of land situated in the county of Santa Barbara, State of California, and known as the "Cosmalia rancho," being the same land which was granted to Antonio Olivera by the Mexican government.

Also all those certain pieces or parcels of swamp and overflowed lands situate in the county of Alameda, State of California, viz., that certain piece described in the field notes of survey No. 208, swamp and overflowed lands, Alameda county, containing 129.60 acres.

Also that certain other piece described in survey No. 223, swamp and overflowed lands, containing 207.09 acres, and that the purchase price was credited on said judgment, and the said property now is owned and held by defendant in his own name.

And the plaintiff further shows that the said W. H. Patterson assigned all his right, title, and interest in and to said claim and of the deed of trust to this plaintiff, and that all the right, title, and interest of the said Wilson and Crittenden has by divers and sundry conveyances been assigned and transferred to this plaintiff, and that plaintiff now owns all the interest they have or ever had.

And this plaintiff further shows that he demanded of Theodore Le Roy a full account and settlement of his trust and conveyance to him of his proper proportion of the real estate standing in his name, but the said Theodore Le Roy refuses to convey any property to him or to pay any money or to recognize his right or the right that he represents in any way.

Wherefore plaintiff prays that the defendant may be compelled to account for all sums received under the said deed of trust, and that he may be decreed to hold all land purchased by him in trust for the plaintiff, and that he be decreed to convey to plaintiff his just proportion thereof, and for such other and further relief as may be necessary, and costs of suit.

TULLY R. WISE,
Att'y for Plaintiff.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss.:*

G. D. Newhall, being duly sworn according to law, deposes and says that [he] is the plaintiff named in the foregoing complaint in the above-entitled action; that he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

G. D. NEWHALL.

Subscribed and sworn to before me this 18th day of June, 1880.
[SEAL.] EDW'D CHATTIN,
Notary Public.

"Endorsed:" Filed June 18, 1880. William A. Stuart, clerk, by P. Deveny, deputy clerk.

21 *Notice of Appearance of Att'y for Defendant.*

Superior Court, City and County of San Francisco.

G. D. NEWHALL *v.* THEODORE LE ROY.

Please take notice that I appear for the defendant in this cause.

Your-, B. S. BROOKS,
Att'y for Def't.

San Francisco, June 23, 1880.
To Tully R. Wise, Esq., Att'y for Pl'ff.

(Endorsed:) I admit service of the within this 23rd June, 1880. Tully R. Wise, att'y for pl'ff. Filed June 23, 1880. Wm. A. Stuart, clerk, by Wm. B. Smith, deputy clerk.

22 *Petition for Removal of Cause to U. S. Circuit Court.*

In the Superior Court of the City and County of San Francisco, State of California. Department No. 2.

G. D. NEWHALL, Plaintiff,
vs.
THEODORE LE ROY, Defendant. } No. 1482.

Petition for removal of cause.

To the honorable the superior court of the city and county of San-Francisco:

The petition of Theodore Le Roy respectfully represents:

That this suit has been commenced against him in this court by G. D. Newhall, plaintiff, and the amount in dispute in this suit, exclusive of costs, exceeds the sum or value of five hundred dollars. The plaintiff herein seeks to charge your petitioner as his trustee of certain real estate of the value of upwards of fifty thousand dollars and to compel a conveyance thereof, and your petitioner
23 denies that he holds the said property or any part thereof in trust for the use of the plaintiff, and the matter in controversy exceeds in value fifty thousand dollars; that your petitioner is an alien, a citizen of the republic of France; that he was born in France and has never changed his allegiance, and the said plaintiff is an American citizen, and your petitioner files herewith his appearance in this cause, and enters his appearance in this court, and offers in this court good and sufficient surety for his entering in the United States circuit court of the ninth circuit in and for the district of California, on the first day of its session, copies of said process against him and all pleadings, depositions, testimony, and other proceedings in the cause.

Wherefore your petitioner prays that this court accept the said

surety and to proceed no further in this cause against your
24 petitioner, and order the same removed for trial into the circuit court of the United States of the ninth circuit, in and for the district of California, next to be held after the filing of this petition.

LE ROY, TH.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Theodore Le Roy, being duly sworn, says that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

LE ROY, TH.

Subscribed and sworn to before me this 23d day of June, 1880.
[SEAL.] SAM. S. MURFEY,
Notary Public.

(Endorsed:) Filed June 23, 1880. Wm. A. Stuart, clerk, by Wm. B. Smith, deputy clerk.

25 *Bond on Removal to U. S. Circuit Court.*

Know all men by these presents that we, Theodore Le Roy, of the city and county of San Francisco, as principal, and Rudolph Steinbach, of the same place, as surety, are held and firmly bound unto G. D. Newhall, of the same place, in the penal sum of one thousand dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals this twenty-second day of June, A. D. 1880.

Whereas the said Theodore Le Roy, being desirous of removing from the superior court of the city and county of San Francisco a suit now pending therein, wherein the said G. D. Newhall is plaintiff and the said Le Roy is defendant, to the circuit court of the United States of the ninth circuit for the district of California, and has presented or is about to present herewith to the said superior court his petition for the removal of said suit into the said
26 circuit court, and to file therewith this bond in compliance with the requirements of the statutes of the United States in that behalf made and provided:

Now, therefore, the condition of the above obligation is such that if the said Le Roy shall enter into such circuit court, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall then appeal, then the said obligation to be void; otherwise to remain in full force and virtue.

LE ROY, TH. [SEAL.]
RUDOLPH STEINBACH. [SEAL.]

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Theodore Le Roy, as principal, and Rudolph Steinbach, as surety, whose names are subscribed to the above bond, being severally duly sworn, each for himself says that he is a resident
27 and freeholder within the city and county of San Francisco, State of California; that he is worth the sum in the said bond specified as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

LE ROY, TH.
RUDOLPH STEINBACH.

Subscribed and sworn to before me this 23rd day of June, 1880.
[SEAL.] SAM. S. MURFEY,
Notary Public.

(Endorsed:) Approved this 23rd day of June, A. D. 1880. John Hunt, Jr., judge. Filed June 23, 1880. Wm. A. Stuart, clerk, by Wm. B. Smith, deputy clerk.

28 *Order of Removal.*

Superior Court, City & County of San Francisco.

G. D. NEWHALL *vs.* THEODORE LE ROY.

The defendant in the above-entitled cause having presented his petition praying for a removal of this cause to the circuit court of the United States of the ninth circuit in and for the district of California next to be holden, after the filing of this said petition, and — the same time entered his appearance herein and offered good and sufficient surety for his entering in the United States circuit court aforesaid, on the first day of the session, copies of the process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause.

And it satisfactorily appearing to this court that this suit
29 has been commenced against the said Theodore Le Roy, and that the same is a civil suit, and that the amount in dispute in this suit, exclusive of costs, exceeds the sum or value of five hundred dollars; that the said Theodore Le Roy is an alien, a native born citizen of the Republic of France; that he has entered his appearance herein and offered good and sufficient surety in his entering in the said circuit court of the first day of the session copies of the said process against him and of all pleadings, depositions, testimony, and other proceedings in the cause:

On motion of B. S. Brooks, esquire, attorney for said defendant, it is ordered that this court accept the said surety and proceed no further in this cause, and that this cause be removed for trial into the circuit court of the United States of the 9th circuit in and for the district of California next to be holden.

Dated June 23rd, 1880.

JOHN HUNT, JR., *Judge.*

30 I hereby certify the foregoing to be a full, true, and correct copy of an order entered on the minutes of said superior court, department No. 2, in the above-entitled cause.

Attest my hand and the seal of said superior court this 25th day of June, 1880.

[SEAL.] WILLIAM A. STUART, *Clerk*,
By M. H. WEED, *Deputy Clerk*.

31 I, William A. Stuart, county clerk of the city and county of San Francisco, State of California, and *ex-officio* clerk of the superior court in and for the city and county, hereby certify the foregoing are full, true, and correct copies of the original papers in the above-entitled cause remaining on file and of record in my office on the 25th day of June, A. D. 1880, and of the whole thereof.

Attest my hand and seal of said court this 25th day of June, A. D. 1880.

[SEAL.] WILLIAM A. STUART, *Clerk*,
By M. H. WEED, *Deputy Clerk*,

(Endorsed:) Filed June 28, 1880. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

32 *Aff. of Service of Summons.*

In the Superior Court of the State of California in and for the City and County of San Francisco.

G. D. NEWHALL, Plaintiff, *vs.* THEODORE LE ROY, Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss*:

Maurice Casey, being duly sworn according to law, deposes and says that he is a citizen of the United States, over the age of 18 years, and not a party to the within action, but competent to be a witness on the trial thereof; that he personally served the annexed summons on the defendant, Theodore Le Roy, by delivering to him personally, in the city and county of San Francisco, State of California, on the twenty-first day of June, A. D. 1880, a copy
33 of said summons attached to a copy of the complaint filed herein.

MAURICE CASEY.

Subscribed and sworn to before me this 2nd day of July, 1880.

[SEAL.] EDW'D CHATTIN,
Notary Public.

Summons.

In the Superior Court, City and County of San Francisco, State of California. Department No. —.

G. D. NEWHALL, Plaintiff, *vs.* THEODORE LE ROY, Defendant.

Action brought in the superior court, city and county of San

Francisco, State of California, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said superior court.

34 The people of the State of California send greeting to Theodore Le Roy, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the superior court, city and county of San Francisco, State of California, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or, if served elsewhere, within thirty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain a decree of this court compelling the defendant to account for all sums received under a certain deed of trust fully described in the complaint on file herein, and that he may be decreed to hold all land purchased by him in trust for the plaintiff and to convey to plaintiff his just proportion thereof, and for such other and further relief as may be necessary, and for costs of suit.

35 Reference to the complaint is hereby expressly made.

You are hereby notified that if you fail to appear and answer the said complaint as above required the said plaintiff will apply to the court for the relief therein demanded.

Given under my hand and seal of the said superior court, at the city and county of San Francisco, State of California, this 18th day of June, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] WILLIAM A. STUART, *Clerk*,
By P. DEVENY, *Deputy Clerk*.

Certificate of Clerk of Superior Court.

I, William A. Stuart, county clerk of the city and county of San Francisco, State of California, and *ex-officio* clerk of the superior court in and for the said city and county, hereby certify the foregoing to be a full, true, and correct copy of the original summons and affidavit of service in the above-entitled cause filed in
36 my office on the 2d day of July A. D. 1880.

Attest my hand and seal of said court this 2d day of July, A. D. 1880.

[SEAL.] WILLIAM A. STUART, *Clerk*,
By M. J. MACGRATH,
Deputy Clerk.

(Endorsed:) Filed July 2d, 1880. William A. Stuart, clerk, by M. H. Weed, deputy clerk. Filed July 2d, 1880. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

37 *Answer.*

In the Circuit Court of the United States in and for the Ninth Circuit, District of California. In Equity.

G. D. NEWHALL, Complainant,
vs.
THEODORE LE ROY, Defendant.

Now comes the said defendant, by Benjamin S. Brooks, his solicitor, and, saving and reserving to himself all benefit and advantage of exception that may be had and taken to the plaintiff's bill of complaint for the many errors, uncertainties, and insufficiences, for answer thereto, or to so much thereof as he is advised by his counsel it is necessary or material for him to make answer unto, answering says:

He admits that on the first day of October, A. D. 1870, Juana M. Estudillo, José Ramon Estudillo, José Antonio Estudillo, José Vicente Estudillo, Louis D. Estudillo, Jesus Maria Estudillo, Magda-
38 lena E. Nugent, and John Nugent were indebted to this defendant in the sum of three hundred and ninety-seven thousand eight hundred and forty-nine dollars ($397,849), but he has no knowledge or information sufficient to enable him to form a belief whether the said parties were indebted to W. H. Patterson in the sum of thirteen thousand dollars ($13,000), to S. M. Wilson and A. P. Crittenden in the sum of thirteen thousand dollars ($13,000), or to John B. Felton in the sum of twenty-three thousand dollars ($23,000), making in all the sum of forty-nine thousand dollars ($49,000), or in any sum to either of said alleged creditors, and therefore he denies the same; but he admits that the said sum of forty-nine thousand dollars added to the sum due to this defendant made the sum of *five* hundred and forty-six thousand eight hundred and forty-nine dollars ($446,849) gold coin of the United States.

He admits that the said Estudillos and the said Nugent
39 agreed on said day to give to defendant Le Roy the deed of trust, a copy of which is set out in the said bill of complaint, and that they did give it, but he knows of no agreement made by the said Estudillos and Nugent other than the agreement which is set out therein; and he denies that they did agree on said day to pay to the parties to whom they were indebted the said sums with interest thereon at the rate of one and a quarter per cent. per month until paid, or that the said trust deed was given in conformity with any agreement except that which is therein set forth.

And defendant, further answering, denies that any amount due to the said Patterson, Wilson, Crittenden, and Felton, or either of them, was included in the said sum of four hundred and forty-six thousand eight hundred and forty-nine dollars.

Defendant admits that he accepted said deed, but he denies that he thereby became or was a trustee for the said William H.
40 Patterson in the sum of thirteen thousand dollars, or for the said S. M. Wilson and A. P. Crittenden, in the sum of thir-

teen thousand dollars, for the said J. B. Felton in the sum of twenty-three thousand dollars, or either of them in any sum.

He denies that he entered into possession of all the real estate therein mentioned, or that he has ever since held the possession thereof; but he says that a considerable part thereof was, at the time of the execution of said deed, held adversely, and all of it has been sold to divers parties.

He admits that all of the personal property in said deed mentioned has been received, and that he has realized large sums therefrom, and that he has realized large sums of money from the use and sale of said real estate and from the sale of personal property, for which he has fully accounted, and all of which is known to the plaintiff's assignors, and said accounts were filed, stated, ad-
41 judicated and determined in said suit mentioned in the bill of complaint.

Defendant admits that he commenced the suit therein mentioned as alleged and appearance and issues joined and trial and judgment as therein alleged; but he denies that the amount due to said Patterson and included in said judgment was thirty-two thousand dollars or ony other sum, and he denies that the amount due to said Wilson and Crittenden and included in said judgment was thirty-two thousand dollars or any other sum.

He admits that a sale took place under said judgment, and that at said sale this defendant became the purchaser not of the properties alleged in the bill of complaint, but of so much thereof as had not been before that time sold by him to other parties, and that the purchase price was credited on said judgment, and that the said property so purchased is now owned and held by defendant in his own name.

42 Defendant, further answering, saith that he has no knowledge nor information sufficient to found a belief whether the said William H. Patterson assigned all or any of his right, title, or interest in or to said claim or to the said deed of trust to the plaintiff, nor whether all of the right, title, or interest of the said Wilson and Crittenden has by divers and sundry conveyances been assigned or transferred to the plaintiff, or whether plaintiff now owns all or any part of the interest they have or ever had, if any, and therefore he denies the same and leaves the plaintiff to make such proof thereof as he may be advised.

Defendant, further answering, admits that the plaintiff demanded of this defendant a full account and settlement of his trust and a conveyance to him of his proper proportion of the real estate standing in his name, and that he refuses to convey any property
43 to the plaintiff or to pay any money to him, or to recognize his right or the right that he represents to any such conveyance or payment, and he denies that the plaintiff is entitled to any part of the said property or money or has any interest therein.

And this defendant, further answering, says that the amount at the date of said trust deed due to this defendant was composed of a sum at that time advanced by this defendant to recover the title of the said property and to discharge liens then existing on the prop-

erty. A suit had been pending which was instituted by the said Estudillo and Nugent (the said John Nugent being the husband of Magdalena Estudillo), against John B. Ward and Concepcion A. Estudillo Ward, his wife, and Dolores Estudillo and Charles H. Cushing, her husband, and Jean Francisco La Costa, seeking to compel a reconveyance of the properties described in the said trust deed and some other real properties described in the complaint in
44 that cause, the title to which it was therein alleged the said defendant had become vested with fraudulently. The said John B. Felton, Wilson and Crittenden, and Patterson, Wallace, and Stow were the attorneys for the plaintiffs in said suit, the said Patterson being the William H. Patterson, the alleged assignor of plaintiff. The suit was instituted about June, 1868, and was at issue by answer filed by defendants denying all the equities of the complaint, and had not been brought to trial. There were several mortgages of large amount existing upon the property, on two of which, held by the Hibernia Bank, a suit had been commenced seeking a foreclosure and sale, and there were four mortgages thereon held by this defendant, and the property was in the hands of a receiver, who had a claim for fees in a large amount which were in controversy. The property being in this situation the parties to said suit of Estudillo *et al. vs.* Ward *et al.* agreed upon a compromise, by the terms of which the property described in the trust deed was to be given
45 up to the Estudillos subject to all the incumberances, and they were to pay the said Ward one hundred thousand dollars, and allow him to retain all the other property which was in controversy in that suit. The Estudillos had no property whatever and no means of paying this sum, or even the expenses of their subsistence, and they had carried on the contest and supported themselves out of the money borrowed from this defendant. All these loans had been negotiated with defendant by the said John B. Felton. The said John B. Felton applied to this defendant to advance the money needed, and this defendant agreed with the said Felten, acting with the said Estudillos, to advance the said sum of three hundred and ninety-seven thousand eight hundred and forty-nine dollars, which was made up of the said one hundred thousand dollars to be paid to Ward and the liens already existing upon the property, which this defendant agreed to assume and pay, including the sum of
46 two hundred and eighteen thousand three hundred and seventy-two $\frac{12}{100}$ dollars due to said Hibernia Bank in their said mortgages, with seven thousand five hundred dollars, attorney's fees, seventy-one thousand five hundred and ninety-two $\frac{58}{100}$ dollars due on the mortgages held by this defendant, and three hundred and eighty-five dollars for stamps on the deed of trust; and this defendant did advance the said sum of one hundred thousand dollars, which was paid to the said Ward as an inducement to him to surrender so much of the property in controversy as is described in the trust deed, and it was paid to him for that purpose, and he did surrender so much of the property, and this defendant did pay and discharge the existing incumbrances upon the property. This defendant had no negot-ation, contract, or agreement with any one but the

said Felton, and the trust deed was prepared and presented by him.

When the trust deed was drawn the said sum of forty-nine
47 thousand dollars was included in the sum secured by said trust deed, which was to be paid only after this defendant should be reimbursed the whole amount due and to become due him for the principal then due at the date of the trust deed, with the interest thereon and all subsequent advances and expenses with the interest thereon, and the said forty-nine thousand dollars was not agreed by any one to be paid in any other way or in any other event, and it was because of this arrangement that while it was provided in the said trust deed, in the fifth article thereof, that this defendant should be entitled "to retain as commission two and one-half per cent. on the gross amount of all sales made by the said party of the second part" (this defendant), it was provided in the eighth article that the said commissions should not be deducted or charged

until all payments above mentioned are made, it being in-
48 tended thereby to provide that the said forty-nine thousand dollars and interest should be paid after the amount due to this defendant for principal, advances, expenses, and interest thereon were paid and before any commissions were paid to him. And afterwards, on or about the 27th day of September, 1871, the said John B. Felton brought to this defendant the draft of a letter which he desired to have written, addressed and signed by him in duplicate, one whereof was to be delivered and the other to be retained by this defendant, with a statement underwritten signed by said Felton certifying to its correctness. And this defendant had the said letter written in duplicate and addressed to the said J. B. Felton, S. M. Wilson, and W. H. Patterson and signed by this defendant, and delivered the same to said John B. Felton, and one of them he retained and to the other of them he, in his own hand, added a

statement of its correctness, dated and signed by him and
49 returned to this defendant, and which he has ever since retained as the evidence of the agreement existing in respect to said forty-nine thousand dollars, and is in the words and figures following:

SAN FRANCISCO, 27 *Sept.*, 1871.

To Messrs. J. B. Felton, S. M. Wilson, and W. H. Patterson.

GENTLEMEN: I hereby certify that you are entitled to the following sums payable out of a certain deed of trust made to me the first day of October, A. D. 1870, by Juana M. Estudillo, José Ramon Estudillo, José Antonio Estudillo, José Vicente Estudillo, Luis D. Estudillo, Jesus Maria Estudillo, Magdalena E. Nugent, and John Nugent—that is to say:

J. B. Felton, Esq., to the sum of twenty-five thousand dollars; S. M. Wilson, Esq., to the sum of twelve thousand dollars; W. H. Patterson, Esq., to the sum of twelve thousand dollars.

50 These sums are to be paid, principal and interest, from the date of said deed as soon as I shall be entirely reimbursed, principal, interest, advances, and expenses.

Respectfully, yours, &c.,

LE ROY, TH.

JOHN B. FELTON.

Sept. 27th, 1871.

This is the true understanding about the above interests, as will fully appear by the original thereof now in this defendant's possession ready to be produced as the court shall direct.

And this defendant further shows that from and after the execution of the said deed of trust the said William H. Patterson continued to act as the counsel and legal adviser of the parties of the first part therein, and the advances made by this defendant were made generally by his advice, and he was employed by this defendant in suits respecting the trust property. He and his associate attorneys were informed of the general condition of the trust

51 at all times and knew that large amounts of money were received by this defendant from sales and rents of property. The suit of this defendant, brought to wind up said trust, was brought by the said Felton. Newhall and Carson signed the complaint as attorneys for plaintiff, and the said Felton signed said complaint as counsel, and the said Patterson appeared and filed an answer as attorney for the defendants. To the said complaint filed were attached as exhibits a copy of said deed of trust and full accounts of receipts, disbursements, and interest and securities held. This complaint was filed September 26th, 1874, and the replication filed April 12th, 1877. The said accounts were carried up to April 10, 1877, and the said cause having, on the 9th day of July, 1877, been referred to John B. M-hoon to take and state the account between the parties and to hear and decide the whole issue and to report a finding and judgment thereon, this defendant did fully account before him and pro-

52 duced and proved vouchers. Upon the examination of this defendant George F. Sharp, Esq., who appeared for some of the defendants, examined this defendant in regard to the said forty-nine thousand dollars, and claimed that the same should not be allowed in the account because it had not in fact been paid, and this defendant in his examination stated the facts in regard to that sum, and that he had not in fact paid it, and that it was not to be paid until he, this defendant, was fully repaid his loans, advances, expenses, and interest, and said testimony and the claims and pretensions of said Sharp were written down in the minutes of said testimony on or about the 14th day of July, 1877, and thereupon the attorney of this defendant notified the said Patterson and Crittenden, the grantors of the plaintiff, of these proceedings, and they came and read them and were fully advised thereof; and the said

53 referee, in his conclusions of law filed in said cause, decided, among other things, in these words: "I decide that the plaintiff is not entitled to deduct from the receipts of his commissions upon the amount of sales made, but said commissions are only to be

paid out of the surplus remaining after the principal and interest is paid, and I have therefore admitted the said items at the foot of the account," thereby intending to give effect to the said eighth article of said trust deed.

And this defendant denies that there ever was any other trust than that hereinbefore set forth, and he avers that he never has been paid the amount due to him for principal, interest, advances, and expenses. On the contrary, he saith that after crediting all the proceeds of sales of said property and all moneys received from the trust estate, and crediting all sureties and property taken by this defendant to his own account, and charging against himself
54 as money received and all other proper credits, there was a deficiency after the closing sale, which was on the first of May, 1880, due to this defendant on his own account, and irrespective of and aside from the said forty-nine thousand dollars and the interest thereon, of thirty-five thousand six hundred and seventeen $\frac{28}{100}$ dollars, no part of which has been paid, and which still remains wholly due and unpaid.

And this defendant denies that he has in his hands or under his control or has received any money in trust for the plaintiff or his assignors, and he denies that he holds any property, real or personal, in trust for said plaintiff, or in respect to which he ought in equity to be charged with any trust.

Without that there is anything in the said plaintiff's bill of complaint contained necessary or proper to be answered unto, and not herein and hereby answered unto, confessed and avoided, or
55 traversed and denied, and he prays that he may be hence dismissed with his reasonable costs in this behalf most unjustly incurred.

B. S. BROOKS,
Sol'r for Def't.

DISTRICT OF CALIFORNIA, } *ss:*
San Francisco, }

Theodore Le Roy, being duly sworn, says that he is the defendant named in the foregoing answer; that he has read said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

LE ROY, TH.

Subscribed and sworn to before me this 31st day of July, 1880.
[SEAL.] SAM. S. MURFEY,
Notary Public.

(Endorsed:) Filed July 31, 1880. L. S. B. Sawyer, clerk.

56 *Replication to Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

G. D. NEWHALL, Complainant, *vs.* THEODORE LE ROY, Defendant.

The replication of G. D. Newhall, complainant, to the answer of defendant.

The repliant, saving and reserving unto himself now and at all times hereinafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to
57 be replied unto by this repliant without this: that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and approve as this honorable court shall direct, and humbly pray as in and by his said bill he has already prayed.

TULLY R. WISE,
Solicitor for Complainant.

U. S. OF AMERICA, }
State of California, } *ss:*

G. D. Newhall, being duly sworn according to law, deposes and says that he is the complainant named in the foregoing replication in the above-entitled action; that he has read said replication
58 and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

G. D. NEWHALL.

Subscribed and sworn to before me this 5th day of August, 1880.

L. S. B. SAWYER,
Comm'r U. S. Circuit Court, Dist. Cal.

(Endorsed:) Due service of a copy of within admitted this 5th day day of August, 1880. B. S. Brooks, solicitor for def't. Filed August 5, 1880. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

59 At a stated term, to wit, the February term, A. D. 1882, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 20th day of February, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Enrollment.

G. D. NEWHALL *vs.* THEODORE LE ROY.

The complainant herein filed his bill of complaint, which is hereto annexed, on the 18th day of June, 1880, in the superior court of the State of California in and for the city and county of San Francisco, State of California.

Afterwards, to wit, on June 28, 1880, a certified copy of the
60 record in the above-entitled suit in said superior court was filed in this circuit court, which is hereto annexed.

On the 2d day of July, A. D. 1880, a certified copy of the original summons and of the affidavit of service thereto was filed in said circuit court, and is hereto annexed.

On the 31st day of July, A. D. 1880, an answer to said complaint was filed, and is hereto annexed.

On August 5th, 1880, a replication to said answer was filed, and is hereto annexed.

Thereafter said cause came on to be heard before said circuit court, and a final decree was filed and entered herein in the words and figures following, to wit:

At a stated term, to wit, the February term, A. D. 1882, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-
61 room in the city and county of San Francisco, on Monday, the 20th day of February, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Decree.

G. D. NEWHALL
vs.
THEODORE LE ROY. } No. 2318.

This cause came on to be heard at the February, 1881, term of this court and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the said complainant's bill be, and the same hereby is, dismissed, and that complainant pay defendant his costs in this behalf expended, to be taxed.

(Signed) LORENZO SAWYER,
U. S. Circuit Judge, Ninth Jud'l Circuit.

Endorsed: Filed and entered Feb'y 20, 1882. L. S. B. Sawyer, clerk.

62 *Memorandum of Costs and Disbursements.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States of the Ninth Circuit in and for the District of California.

G. D. NEWHALL, Plaintiff, *vs.* THEODORE LE ROY, Defendant.

Disbursements.

Clerk's fees, superior court	$10		
Clerk's fees, U. S. C. C., filing papers	10		
Abstract answer, Estudillo *vs.* Ward (used as exhibit)	10	90	
Examiner's fees taking testimony	86	80	
" " " in rebuttal	28	60	
Reporters fees taking test'y, &c.	36	60	
Printing brief	40		disall'd
Attorney's docket fee	20		
Clerk's fees U. S. C. C., ent., judgment, &c.	36	90	
Affidavits	1	50	
	$281	30	
	40		
Taxed at	$241	30	

L. S. B. SAWYER,
Clerk.

63 UNITED STATES OF AMERICA, } ss:
District of California, City and County of San Francisco, }

Raphael Citron, being duly sworn, deposes and says that he is a clerk of B. S. Brooks, Esq., the attorney for the defendant in the above-entitled cause, and as such is better informed relative to the above costs and disbursements than the said defendant; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

RAPHAEL CITRON.

Subscribed and sworn to before me this 21st day of February, A. D. 1882.

L. S. B. SAWYER,
Commissioner U. S. Circuit Court, &c.

To Tully R. Wise, Esq., att'y for pl'ff:

64 You will please take notice that on Thursday, the 23d day of February, A. D. 1882, at the hour of 11 o'clock a. m., I will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said court in such case made and provided.

B. S. BROOKS,
Attorney for Defendant.

(Endorsed:) Filed this 21st day of February, A. D. 1882. L. S. B. Sawyer, clerk.

65 *Certificate to Enrolled Papers.*

Whereupon said pleadings, subpœna, and final decree and memorandum of taxed costs are hereto annexed, said decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, &c.: L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:) Enrolled papers. Filed 21st February, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

66 *Stipulation.*

In the Circuit Court of the United States in and for the Ninth Circuit, District of California.

G. D. NEWHALL, Plaintiff, *vs.* THEODORE LE ROY, Defendant.

It is stipulated and agreed between the parties to this suit, by their respective solicitors, that the testimony which has been heretofore taken, or may hereafter be taken, down by the short-hand reporter, Mr. Houghton, shall be written out by him in long hand. It shall not be necessary that such testimony should be read over to the witnesses or subscribed by him, but the said testimony (all other requirements of the law and the rules of the court having been complied with) shall have the same force and effect, and be
67 subject to the same objections, and no others, as if the same had been read over to the witness, corrected by him, and subscribed by him.

March 28th, 1881.

TULLY R. WISE,
Solicitor for Plaintiff.
B. S. BROOKS,
Solicitor for Defendant.

(Endorsed:) Filed March 28, 1881. L. S. B. Sawyer, clerk.

68 *Stipulation.*

In the Circuit Court of the United States in and for the Ninth Circuit, District of Chlifornia.

G. D. NEWHALL, Complainant, *vs.* THEODORE LE ROY, Defendant.

In this case it is stipulated that the deposition of W. H. Patterson, a witness on behalf of the complainant, be taken before J. F. O'Beirne, commissioner, at the house, on the San Pedro rancho, occupied by said Patterson, on the 17th day of July, A. D. 1880. It is further stipulated that said deposition may be used precisely as

if the pleadings were amended and at any stage of the proceedings.

San Francisco, July 9, 1880.

B. S. BROOKS,
Solicitor for Defendant.
TULLY R. WISE,
Solicitor for Complainant.

(Endorsed:) Filed 13th July, 1880. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

69 Circuit Court of the United States for the District of California.

G. D. NEWHALL
v.
THEODORE LE ROY. } No. —.

Be it remembered that on the 17th day of July, A. D. 1880, at the residence of Wm. H. Patterson, on the Rancho San Pedro, in the county of San Mateo, State and district of California, personally appeared before me, Joseph F. O'Beirne, a commissioner duly appointed by the circuit court of the United States for the district of California, William H. Patterson, a witness on behalf of the plaintiff in the above-entitled suit.

Tully R. Wise, Esq., appeared as attorney for the complainant, and Benjamin S. Brooks, Esq., appeared as attorney for the defendant. And the said witness having been by me duly cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth, did thereupon depose and say as follows, to wit:

70 *Deposition of W. H. Patterson.*

1 Question. Mr. Patterson, did the Estudillos mentioned in the deed dated October 1st, 1870, made to Theodore Le Roy, owe you and John B. Felton and Messrs. Crittenden and Wilson any money, and, if so, how much and what was it for?

Answer. They did, for legal services rendered by the firm of Patterson, Wallace and Stow, and also by Mr. Crittenden, now deceased, and the amount was adjusted and evidenced by a certain deed of trust between the Estudillos on the one part and Theodore Le Roy on the other part. I have forgotten the date of the deed. The amount due to Patterson, Wallace and Stow was twenty-nine thousand ($29,000) dollars. On the dissolution of the firm of Patterson, Wallace and Stow that deed became my property.

2 Question. When that deed was made was your sum included in that deed; was it to be secured by it?

(Objected [to] as leading and incompetent.)

71 Answer. It was secured by the deed made by the Estudillos to Le Roy.

3 Question. What amount did you have, if any, secured by that deed?

Answer. The firm of Patterson, Wallace and Stow had thrtieen thousand dollars and interest, Messrs. Crittenden and Wilson a like amount, and John B. Felton had the residue.

4 Question. The deed recites that the sum of $446,849, gold coin of the United States, was due to Theodore Le Roy from the parties of the first part; do you know whether the sum due to you and to Messrs. Wilson and Crittenden and Felton formed a part of the sum so recited to be due to Le Roy? If so, state what the fact was.

(Objected to as leading and irrelevant.)

Answer. It did form a part—it formed the fee of Patterson, Wallace and Stow and the fee of Messrs. Wilson and Crittenden.

72 5 Question. What service did you and Messrs. Wilson & Crittenden and John B. Felton render to the parties of the first part for which they owed you a fee?

Answer. Rendered services growing out of compelling a conveyance from John Ward to the Estudillos of the rancho at San Leandro, the rancho Guadalupe, and another rancho in Santa Barbara county, and compelling a conveyance for the benefit of the Estudillo family.

6 Question. Was that the property mentioned in the deed of trust?

Answer. It was.

7 Question. Were the amounts to be paid to the counsel by the parties of the first part to that deed agreed upon by the said parties or not?

73 Answer. The amount to be paid to the counsel was adjusted by Mr. Le Roy and Mr. Felton, to which agreement I was not a party at the time, and I do not know that I knew of it at the time; but it was subsequently assented to by me on behalf of my firm.

(This answery is objected to as secondary evidence—hearsay evidence.)

8 Question. Did Mr. Felton or Mr. Le Roy inform you of that fact?

Answer. They both did.

(Same objection.)

9 Question. Do you know whether the parties of the first part to that deed knew that the sum due to you and the other counsel was included in that deed?

Answer. I know that they knew it.

10 Question. Do you know what they knew of it?

Answer. From conversations with them, more particularly from conversations with John B. Nugent.

(Objected to same as above and also as incompetent.)

74 11. Question. Was there at any time difficulty raised by any of the parties to that deed of trust, and, if so, by whom; what was the difficulty, and how was it arranged?

Answer. After the deed of trust was prepared, & according to my recollection, all executed it except Mrs. Estudillo, who raised objec-

tions to it. She refused to execute it unless more money was advanced. I procured $3,000 to be paid to her by way of advance and to be secured by the deed of trust. I procured the money—the advance—and then she was satisfied, expressed herself so, and thereupon she executed the deed of trust.

(Objected to as irrelevant.)

12 Question. Was that sum of money to be secured by the deed of trust?

Answer. It was.

75 13 Question. Was that sum included in the amount recited to be due to Theodore Le Roy?

(Objected to as leading and incompetent.)

Answer. It was and interest.

14 Question. Was that sum included in the amount due to you, or was it in addition thereto?

(Same objection.)

Answer. It was in addition to the amount I claimed.

15 Question. How did you succeed to the interest of Wallace and Stow of your firm?

Answer. I purchased of them—Wallace and Stow—all the unfinished legal business of that firm, all the debts due to that firm, and I agreed to pay all the remaining debts of that firm.

16 Question. When Mr. Le Roy and Mr. Felton informed you that your claims were included in that deed of trust, did they

76 or either of them ever inform you that there was to be any priority of payment to anybody to be benefitted by that deed?

(Objected to as leading and incompetent.)

Answer. They never did.

17 Question. Did you ever hear from them, or either of them, at any time that there was any priority of payment to the parties interested?

(Same objection.)

Answer. I heard so, but not until recently.

18 Question. Did you ever hear it from Mr. Felton and Mr. Le Roy?

Answer. I never heard it from Mr. Felton; I heard it from Mr. Le Roy; never heard it from both of them.

19 Question. Have you had conversations with Mr. Le Roy at different times about your claim? And, if so, state about how many.

Answer. I believe I have had two conversations with Mr.

77 Le Roy about that fee, but mainly with Mr. Steinbach, who was acting for Mr. Le Roy.

20 Question. In any of those conversations did Mr. Le Roy or anybody for him state to you or claim that the amounts due to you

was to be *pos-poned* in payment to any other portion of the debts secured by that deed of trust?

(Objected to as incompetent.)

Answer. I never heard of any of those claims until within three months; I mean until within three months last past.

21 Question. Was Mr. Felton your agent for any purpose connected with such claim after your ratification of the deed of trust?

(Objected to as leading.)

Answer. He was not in any way, shape, or manner.

22 Question. At the time you ratified the transaction on
78 your behalf was the deed shown to you?

Answer. It was.

23d Question. Was any statement then made?

Answer. A statement was shown showing the amount of indebtedness which the Estudillos was to pay to John B. Ward with Mr. Le Roy.

(Objected to as secondary evidence and as irrelevant.)

24th Question. Was any statement made to you when you ratified the transaction that your claims were to be *pos-poned* to the payment of any other claims?

(Objected to as leading, incompetent, and irrelevant.)

Answer. No statement or understanding that I was to be *pos-poned* or deferred in any manner.

25th Question. The amount of $3,000 that you procured to — paid to Mrs. Estudillo—who paid it?

79 Answer. I borrowed the money and paid it to her.

26th Question. For what purpose was that paid to Mrs. Estudillo?

(Objected to as immaterial.)

Answer. She claimed that she owed the priest and some charity debts to dependents of the family; she insisted on those being paid, otherwise she would not sign the trust deed. Mr. Nugent came to me with that statement, and I went to get the money, and paid it to her.

27 Question. After you paid the money to her did she sign the deed?

(Objected to as incompetent.)

Answer. She did, the next day.

28 Question. Has Mr. Le Roy at any time informed you that he was going to make a sale of any portion of the property secured by the deed?

(Objected to as immaterial.)

80 Answer. He did yesterday.

29 Question. Did he inform you that he was going to bring a suit [to] foreclose his lien on the lands claimed in that deed?

Answer. He did not inform me personally, but I knew of it.

30 Question. Since the judgment of foreclosure in that suit has he informed you that any sale was about to take place?

(Objected to as immaterial.)

Answer. I don't think he ever did, personally.

Cross-examination:

1 Question. You say that the indebtedness from Patterson, Wallace and Stow was $29,000?

Answer. No, it was $13,000; the balance of the $29,000
81 was made up by the claim of Crittenden & Wilson. I don't remember the exact —. Mr. Wilson & Crittenden had a certain amount and we had a certain amount. I have forgotten the balance.

2 Question. What was the total amount due to Patterson, Wallace & Stow, Crittenden & Wilson, & John B. Felton for legal services?

Answer. I think it was something like $40,000. I don't remember the figures exactly. It was adjusted by Mr. Crittenden, Mr. Felton, & Mr. Wallace.

3 Question. Were those sums due to them for services rendered jointly.

Answer. Messrs. Wilson & Crittenden as one firm, Patterson, Wallace & Stow as another firm, and John B. Felton as another. We acted as separate counsel and not in partnership. I rendered many services that Messrs. Wilson & Crittenden had nothing
82 to do with, and Mr. Felton and I rendered services in other matters.

4 Question. What is this suit to which you refer in which you all rendered services?

Answer. The case of the Estudillos against Ward & *al.;* it was to compel a conveyance *to* Ward and the Cushings of some property to the Estudillos. It was instituted in the 12th district court.

5 Question. What were the other matters in which you and John B. Felton rendered service to the Estudillo family?

Answer. Well, there was the action of ejectment for the Cosmali rancho—Le Roy *vs.* Clayton—in the U. S. circuit court; also, an action of ejectment for the Guadalupe ranch- (Le Roy *vs.* Jamison), in the U. S. circuit court; don't remember of any other litigation commenced by me.

6 Question. How did you compel Ward to convey to the Estudillos?

83 Answer. By compromise; by filing a bill which resulted in the compromise.

7 Question. What was that compromise?

Answer. In short, that Mr. Ward and his cotenants conveyed the Estudillo rancho, the Guadalupe rancho, the Cosmalli rancho. We paid him, or, rather, Mr. Le Roy paid him, this money shown by the deed of trust.

8 Question. You do not mean to be understood that there was paid to Ward $446,849?

Answer. No, there was paid him about $100,000.

9 Question. Did he convey all the property which was demanded in your bill?

Answer. I believe so.

10 Question. Was there not one rancho—the Cajo or Punta de la Concepcion—in the compromise that he was allowed to retain?

84 Answer. I don't remember clearly, but I think there was something to that effect, if I am not mistaken about it.

11 Question. Was he by the compromise allowed to retain a portion of the San Leandro rancho?

Answer. I think so—both he and Mrs. Cushing.

12 Question. Were these mortgages at that time upon the property which he conveyed?

Answer. I think so; I am not clear about that.

13 Question. The sum of $218,372.12 mentioned in that deed of trust as due by Ward to the Hibernia Bank and assumed to be paid by the party of the second part, was that the amount due on said mortgages and agreed in the compromise and to be assumed by the Estudillos?

85 Answer. That was the amount so far as I recollect.

14 Question. Was that in addition to the sum which was to be paid to Ward himself?

Answer. It was; he was to be paid $100,000 separate from any incumbrances of the Estudillos.

15 Question. By whom was the $100,000 advanced?

Answer. By Mr. Le Roy, I think; I so understand it.

16 Question. Is that sum included in the sum of $446,849 secured by the trust deed?

Answer. Yes.

17 Question. Was Mr. Le Roy the holder at the time of mortgages upon the same property in his favor?

Answer. I believe not; I understand not.

86 18 Question. What were the properties connected with the San Leandro property that you referred to?

Answer. There was the San Leandro rancho, the Estudillo house, and some small buildings.

19 Question. Did not Mr. Ward hold as well the cattle as the rancho?

Answer. He did.

20 Question. Was there any property besides this claimed by the Estudillo family in the bill you filed against Ward?

Answer. I don't know of any.

21 Question. At the time of the compromise had not this suit been a long time pending, and were not the properties in the hands of a receiver?

Answer. The suit had not been pending a long time; there 87 was a receiver only for the Guadalupe rancho. Robinson, the receiver, made a claim for fees, which was in contest at the time, & Le Roy was to pay whatever was established.

22 Question. By whom was the negotiation with Le Roy, which led to the making of this trust deed, made?

Answer. By Felton, John Nugent, and perhaps Mr. Steinbach.

23 Question. When and where did you have your first interview with Theo. Le Roy, and who was there present?

Answer. At his office; I don't remember of any one being present; it was some time during the last year.

24 Question. When and where did the second interview take place?

Answer. I think in the same office; that was when his office was fronting on Jackson St.; it was in the morning, about 10 o'clock.

88 25 Question. Did you act as counsel for the Estudillo family generally after making the trust deed?

Answer. I did.

26 Question. Why did Mrs. Estudillo insist upon the advance of the $3,000?

Answer. I don't know; I only know what she claimed. She claimed she owed the Catholic priest and some objects of charity and hangers on.

27 Question. Did she not state to you and give as a reason, and was it not true, that she had no other means of paying this sum?

Answer. I think there was some talk in substance that way, and that she relied on us for her family expenses.

28 Question. Had the family any means of support?

Answer. None, so far as I know, except the income derived

89 from those ranches embraced in the trust deed.

29 Question. Were they at that time in the receipt of that income?

Answer. I think they were, from dairy cows and from selling milk. Jesus Maria Estudillo was running the ranch.

30 Question. In the arrangement made was there any provision made for the support of the family?

Answer. I think there was, but am not certain of that; I think Le Roy was to advance certain sums monthly.

31 Question. Was there not legal work and expenses to be provided for?

Answer. I do not know that there was; I do not know of any for which provision was made or which were talked about.

90 32 Question. You have spoken of the suit of Le Roy *vs.* Clayton & *al.* & Le Roy *vs.* Jamison & *al.* as if those suits were prior to the compromise with Ward. Were they not in fact after the making of the trust deed to Le Roy?

Answer. They were commenced and prosecuted after the execution of the trust deed?

33 Question. Were not those suits grounded upon a second patent resulting from proceedings in the land department which was pending at the time of said compromise inaugurated by Ward?

Answer. The proceedings were inaugurated by Ward which resulted in the obtaining of the patent and were pending at that time.

34 Question. Are you not mistaken then when you say that at that time there were no legal expenses?

Answer. No; because we expected the patent every day,
91 and if it had not been for the dishonesty of Edwards, of the land office, we would have had the patent at the time the compromise was wound up. The patent was issued and sent out here to be delivered, but the order was countermanded.

35 Question. Did not Mr. Le Roy pay you your fees in Le Roy *vs.* Jamison and Le Roy *vs.* Clayton?

Answer. He did in Le Roy *vs.* Jamison, but not in Le Roy *vs.* Clayton. I think it was lopped off in the last case by my not making any claims for the fees.

36 Question. Are you not mistaken in saying that at the date of the trust deed to the Estudillo family — were indebted to you for legal services rendered in cases of Le Roy *vs.* Clayton and Le Roy *vs.* Jamison?

Answer. I don't think I so stated.

37 Question. Were you not counsel in the foreclosure suit of Le Roy *vs.* Estudillo & *al.?*

92 Answer. No; I was not. Mr. Newhall drew up the complaint in that case in my office, and asked me to look over it and make any corrections I might think to be needed; I believe I did not make any.

38 Question. Did you not appear in that case for some of the defendants?

Answer. I think I did; I am quite certain I did; I saw the complaint either before or shortly after its filing.

39 Question. Did you make a motion for injunction in that case?

Answer. I don't recollect of having done so.

40 Question. Did you have, as attorney for the defendants, in your hands the complaint, shortly after the commencement of that suit?

Answer. I had a copy of the complaint handed to me by Mr. Felton and Mr. Newhall.

93 41 Question. Did you see the accounts filed at the time of the motion for injunction or copies thereof?

Answer. I have seen them, but never saw them in connection with examining them.

42 Question. Did you appear at the reference before M-hoon?

Answer. I think I appeared one day, but took no part in any shape or way.

(Signed) W. H. PATTERSON.

Subscribed and sworn to before me this 17th day of July, A. D. 1880.

JOS. F. O'BEIRNE,
Examiner in Chancery & Comm'r U. S Circuit Court, Cal.

94 UNITED STATES OF AMERICA, }
District of California, } *ss:*

I, Joseph F. O'Beirne, a commissioner duly appointed by the circuit court of the United States for the district of California, do hereby certify that under and in pursuance of the foregoing stipulation

hereto annexed, on the 17th day of July, A. D. 1880, at the residence of William H. Patterson, the rancho San Pedro, in San Mateo county, in the State and district of California, I was attended by the counsel and witness aforesaid; that said witness was by me duly sworn and cautioned to testify to the truth, the whole truth, and nothing but the truth in relation to the matters about which he should be interrogated in the cause aforesaid; that thereupon he testified as hereinbefore set out, and that his answers to the interrogatories of counsel were by me reduced to writing in the
95 presence of said counsel and witnesses, and that after the completing the taking of said deposition the reading of the same to witness was, at his request and by consent of counsel, waived, and thereupon the witness signed said deposition.

Witness my hand this 19th day of July, A. D. 1880.

JOS. F. O'BEIRNE,
Commissioner.

(Endorsed:) Opened, published, & refiled this 26th day of April, A. D. 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

96 In the Circuit Court of the United States for the Ninth Judicial Circuit in and for the District of California.

GEORGE D. NEWHALL *v.* THEODORE LE ROY.

Be it remembered that on the 30th day of December, A. D. 1880, and upon the days subsequent thereto to which said hearing was from time to time regularly adjourned, as hereinafter appears, at my office, in the city and county of San Francisco, State of California, before me, Joseph F. O'Beirne, an examiner in chancery, duly appointed by the circuit court of the United States for the ninth circuit and district of California, personally appeared the persons hereinafter named, witnesses on behalf of the respective parties in the above-entitled action.

T. R. Wise, Esq., appeared as solicitor for complainant, and B. S. Brooks, Esq., as solicitor for respondent.

And the said witness having been by me duly sworn to tell the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did then and there depose and say as follows—that is to say:

97 Examination-in-chief of EDWARD KIRKPATRICK, a witness on behalf of complainant, by Mr. WISE:

Q. 1. State your name, age, and place of residence.

A. My name is Edward Kirkpatrick; I am forty years old, and my residence is San Francisco.

Q. 2. Do you know William H. Patterson and Charles McLaughlin?

A. I do.

Q. 3. Are you the Edward Kirkpataick whose name appears in the document now shown you?

A. I am.

Q. 4. Are you acquainted with Mr. Patterson's signature?

A. I am.

Q. 5. And with Charles McLaughlin's signature?

A. I am.

Q. 6. State whether or not the signature upon the paper referred to, purporting to be the signature of W. H. Patterson, is his genuine signature.

A. It is.

Q. 7. Is the signature of Charles McLaughlin upon that paper his own signature?

A. It is.

98 Q. 8. Is the signature which purports to be your own signature upon that paper genuine?

A. It is.

Cross-examination by Mr. BROOKS:

Q. 1. How do you know that that is Mr. Patterson's signature?

A. I saw him write it.

Q. 2. When was it written?

A. It was written on or about the day mentioned in the document, at the adobe at San Pedro, according to my recollection of it.

Q. 3. What was Mr. Patterson's condition at the time he signed that?

A. He was pretty well when he signed it—pretty well for him. That answer might be qualified by saying that for some years he has been suffering from paralysis—partial paralysis I suppose it is—and heart disease.

Q. 4. Did he read this document?

A. He did.

Q. 5. Was he able to understand it?

A. Perfectly.

99 Q. 6. You think he understood what he was doing?

A. I have no doubt about it.

Q. 7. Is his mind affected?

A. You speak of the present time?

Q. 8. I speak of the present time and I speak of time when this document was signed by him.

A. At the time that was signed by him his mind was not affected.

Q. 9. Has he been able to attend to any business for a year past?

A. He has attended to a good deal of business—not in town; he has attended to such business as it was necessary that he should attend to personally at the adobe; I have myself transacted a good deal of business with him.

Q. 10. How long has he been confined to the house?

A. He is not now confined to the house.

Q. 11. How long since he has left the place where he resides at San Pedro?

A. I don't think he has left there for somewhere about nine months.

Q. 12. This document you say was made at San Pedro?

100 A. Yes; that was made at San Pedro.

Q. 13. Why was it made at San Pedro if he was at that time coming to the city?

A. Because he was spending some time at San Pedro and that business came up with considerable other business that came up before him at that time. I can't say why that was made at San Pedro rather than here, except that he happened to be there at the time; probably was spending a week or two there.

Q. 14. Do you know when this instrument signed by Charles McLaughlin was signed?

A. I do not.

Q. 15. How do you know that it is his signature?

A. From having seen him write a number of times.

Q. 16. Was your own signature appended to that instrument on the day it bears date?

A. I don't remember at the present moment; I can't say as to the exact dates, as to the signatures being of the exact dates
101 shown in the document; I presume that is the case.

Q. 17. Don't you know when you signed it?

A. No, sir; I don't remember when I signed it.

Q. 18. Why was the assignment made to you?

A. I was negotiating with Mr. McLaughlin with regard to some matters at that time and expected the matters would come to me, but failed to carry it out.

Q. 19. Why did you transfer it to Newhall?

A. That was a part of an arrangement between —. Perhaps it would be better for me to say that for the past year I have had business relations with both of these gentlemen, and that entered into our transactions.

Q. 20. I understand you that you took that from Mr. McLaughlin as a part of a transaction which was not consummated, which fell through?

A. I won't say as part of a transaction. At the time that transaction was made to me it was my desire to be able to control
102 the matter. That would probably be the correct statement statement of the case.

Q. 21. You say that fell through?

A. I was unable to carry it out.

Q. 22. How happens it that if you took that as a part of a negotiation which you expected to carry out, but which afterwards fell through——

A. (Interrupting.) I don't say that. If you will excuse me, Mr. Brooks, I don't say it was a part of a negotiation at all. I simply say that the assignment was made to me, and having transactions with both of those gentlemen, and ultimately not wishing to control the matter myself—I will put it in that shape—which I had originally expected to do, in my transactions with Mr. Newhall I made this assignment to him.

Q. 23. Well, sir, how happens it, then, that you transferred it to Mr. Newhall on the very day that you got it from Mr. McLaughlin?

A. I transferred it to Newhall, and it was done through my un-

derstanding with Mr. McLaughlin, most likely at his request.
103 I know we had a conversation upon the subject.

Q. 24. How is it that you cannot tell when it was done?

A. I can tell from the paper. I can't swear that it was done on that day, but I can only say that I presume it was done somewhere about that time—on or about that day.

Q. 25. There seems to have been, according to your account, some interval between the time that you got it from McLaughlin and the time of the change?

A. No, sir; there was no interval of time. I was twice in Mr. McLaughlin's office, [I] think, on the day that those subjects were under consideration. I can't state positively.

Q. 26. What interest had Mr. Newhall in this matter?

A. I am not able to say what his interest is.

Q. 27. Had you any interest in it?

A. Yes, sir; I had an interest in it.

Q. 28. What interest?

A. At the time it was assigned to me I had the whole in-
104 terest in it. Mr. McLaughlin assigned to me his interest in it.

Q. 29. That I perceive by the writing. Did you pay McLaughlin anything for it?

A. Well, I had an account with McLaughlin.

Q. 30. Did you pay Mr. McLaughlin anything for it?

A. I don't know what you mean by the question; if you mean was there a consideration, there was.

Q. 31. What was the consideration?

A. The consideration was transactions between Mr. McLaughlin and myself; I cannot at this moment say precisely or exactly what that consideration was, because I have had repeated transactions with Mr. McLaughlin for the past year.

Q. 32. Did you part with anything of value at that time?

A. I can't say whether at that particular time I did or did not, but I had other transactions with him before and after.

Q. 33. Did Mr. McLaughlin receive anything at that time
105 in consideration of this transfer?

A. I can't tell about the time.

Q. 34. At that time?

A. I can't tell, sir.

Q. 35. What was the nature of your transactions with Mr. McLaughlin that you speak of?

A. I paid and received money to and from Mr. McLaughlin during the past year, more or less.

Q. 36. Did he owe you money at that time?

A. I don't remember whether he did or not at that time, sir. If I had had some notice of these questions I could have looked up the accounts and could have told you.

Q. 37. What was the nature of the accounts between you and Mr. McLaughlin?

A. I might say, to begin with, that I have charge, on behalf of Mr. McLaughlin, of some three thousand acres of land, I think, that

I managed for him, and some other things, and have accounts—well, monthly, I should say.

Q. 38. Did you release from him any indebtedness at that time?

106 A. I can't tell.

Q. 39. Did you credit him with any particular sum in the account?

A. I can't tell you.

Q. 40. Did you agree to?

A. I can't tell at this time.

Q. 41. Were you to have any pecuniary or beneficial interest in this thing at all—in the money to come out of that?

A. You mean the assignment of McLaughlin to myself?

Q. 41. Yes.

A. Yes, sir.

Q. 42. What were you to have?

A. I am not perfectly sure that I have somewhere, I think, a memorandum.

Q. 43. A written memorandum?

A. I think I have a memorandum somewhere of matters relating to that affair, but I can't tell now what it is or just where it is.

Q. 44. Relating to what affair?

A. The affair of the assignment—the assignments.

Q. 45. Who was the party who was to receive the benefit of this?

A. On that assignment to me?

Q. 46. Yes.

107 A. I was the party. I was to receive the whole benefit. I didn't understand your question before.

Q. 47. You were to receive the whole benefit?

A. I was to receive the whole benefit.

Q. 48. How much did you receive when you transferred it to Newhall?

A. When I transferred it to Newhall I can't say. Understand me, please. I was to receive the benefit when the assignment was made to me. The arrangements not having been, perhaps, carried out on my part—perhaps that would be a proper way to state it—I then assigned to Newhall.

Q. 49. Did Newhall pay you anything?

A. No, sir.

Q. 50. Did Newhall pay anybody anything?

A. I don't know.

Q. 51. For whom did Newhall hold it, then?

A. Mr. Newhall holds it for his own benefit.

Q. 52. If he paid nothing for it?

A. Well, he paid me nothing,

Q. 53. Did he pay any one anything?

A. I can't say.

108 Q. 54. You had not paid anything for it, had you?

A. I had paid something for it, as I say, in the way of my accounting with Mr. McLaughlin; there was a consideration for it.

Q. 55. You didn't release your account against Mr. McLaughlin;

you didn't credit him with anything; your account with him stands as it always did. I don't see, Mr. Kirkpatrick, the reason for this reticence. It is that which excites my curiosity. I don't see why there should be any reticence. You say because you did not carry out your arrangements you transferred this to Newhall. At whose instance or by whose direction did you do that?

A. I can't give the conversation that took place, but as a part of the subject-matter there was a conversation between Mr. McLaughlin, Mr. Newhall, and myself in Mr. McLaughlin's office, and the result of that was that the assignment was made as appears there.

109 Q. 56. You say that because you were unable or failed to carry out the arrangements on your part you transferred it to Newhall?

A. I don't wish to put too much stress on my failure to carry out the arrangements; I simply wish you to understand that I had accountings and business with Mr. McLaughlin.

Q. 57. (Interrupting). If the arrangment merely related to the accounts it was a very easy matter to carry them out. It was all within your own hands. What was the arrangement and what was it that you failed to carry out?

A. What I failed to carry out was this: I couldn't undertake to carry the thing; therefore I disposed of it; that is the long and short of it.

Q. 58. To carry what?

A. Carry the claim against Le Roy.

Q. 59. What was the trouble in carrying it?

A. I couldn't afford to—— (pauses).

Q. 60. Do you mean to carry suit through?

A. No.

110 Q. 61. Then what do you mean?

A. I couldn't afford to buy it.

Q. 62. Did you agree to buy it from Mr. McLaughlin?

A. I had no distinct agreement to buy it from him; no.

Q. 63. What was your agreement with him?

A. I don't remember.

Q. 64. But you failed to carry it out?

A. You are not putting that quite in the right light, Mr. Brooks. What I failed to carry out was not my agreement with Mr. McLaughlin or anybody else. What I failed to carry out was to hold the claim myself.

Q. 65. You don't seem to consider that you transferred this claim to Newhall on the very day you received it?

A. I did.

Q. 66. Then all your arrangement and your failure to carry it out occurred between the time of making of one instrument and the time of the making of the other, did it?

A. The conclusion that I arrived at was arrived at on the

111 same day, probably; but I can't speak positively as to that. I can only judge as to them as they appear on the paper. I presumed they corresponded.

Q. 67. What was the conversation that occurred between you and Mr. McLaughlin and Mr. Newhall on that day?

A. I can't tell. I have had a great many conversations with those gentlemen. I can't say what it was.

Q. 68. Did you have more than one conversation with those gentlemen that day?

A. I can't speak positively as to that day; but if that is the day upon which the papers are signed it is very likely that I did. As regards the dates I get my light from the paper itself.

Q. 69. You say you were present when this instrument was signed by Mr. Patterson?

A. I was present.

Q. 70. Who else was present?

A. I don't remember whether any one else was present or not.

112 Q. 71. Did you receive the paper?

A. I received the paper.

Q. 72. What did you do with it?

A. I delivered it to Mr. McLaughlin.

Q. 73. Where?

A. At his office in San Francisco.

Q. 74. Did you pay Mr. McLaughlin any money?

A. On the delivery of that paper? No, sir.

Q. 75. Did you receive anything from him?

A. No, sir.

Q. 76. Did you pay Mr. Patterson anything?

A. At the time of the execution of the paper; no, sir.

Q. 77. Did anybody?

A. I don't know, sir; I know this, if you want to know what the consideration was of that agreement——

Q. 278 (Interrupting). No; I want to know — you know.

A. I know that Mr. Patterson was owing Mr. McLaughlin a large sum of money.

Q. 79. Were you present at any agreement made between Mr. Patterson and Mr. McLaughlin?

A. No, sir.

113 Q. 80. Who took the paper down to San Pedro?

A. I took the paper down myself.

Q. 81. At whose request?

A. I can't tell you now at this instance of time.

Q. 82. Who wrote the paper?

A. It is in my handwriting; I can't tell now whether that paper was written in San Francisco or in San Pedro; if written in San Francisco I took it down.

Q. 83. To whom was it transferred first?

A. From Mr. McLaughlin?

Q. 84. Yes.

A. To me.

Q. 85. Was there not an assignment before this on the same paper cut off?

A. No, sir.

Q. 86. How came the paper in that shape; how came the bottom of it torn off or cut off?

A. I can't say as to that at the present moment.

Q. 87. If you drew the paper in your office you did not draw it on a piece of paper of that shape, did you?

A. I am not sure if I did not draw that paper at the adobe
114 at San Pedro from my memorandum or something that I took with me to San Pedro.

Q. 88. But you don't know?

A. It seems to me so at the present moment.

Q. 89. Is it your own dictation?

A. I don't remember now; the matter has been for some time a subject of ——

Q. 90. (Interrupting.) It is evident, is is not, that that first assignment was originally written on an entire half-sheet of foolscap, and that the bottom of it has been cut off or torn off since it was executed?

A. I wouldn't swear to it.

Q. 91. Isn't that your opinion from the appearance of the paper?

A. It is very possible that the bottom part of the sheet had some writing or something on it that did not appertain to that transaction at all and was torn off.

Q. 92. Why should anything be written on that paper that did not appertain to that transaction?

115 A. It is very possible that the piece of paper may have been written on on the back, and it was not observed when the paper was drawn.

Q. 93. But you know nothing about it?

A. I know nothing positively about that. I should think it very probable that that had been torn off. I should say so. I may have done it myself.

Q. 94. You don't know why it was done—you have no memory on that subject?

A. I can't swear positively now.

Q. 95. Have you any recollection about it?

A. I can't say just at this moment.

Q. 96. Was there not an assignment made of that thing before the assignment to you—an assignment from McLaughlin to another party?

A. No, sir; I can swear positively as to that.

Q. 97. But you cannot swear positively as to what that was which was written on the bottom of that paper?

116 A. I can't swear positively what it was; no, sir.

Q. 98. Have you any recollection what it was?

A. My recollection is, when I come to reflect, that there was a half sheet of paper upon which that was written, and it is more than probable that there was something written on the bottom; as to what it was I can't undertake to swear; but I am positive that the assignment from Charles McLaughlin to myself was the first assignment; that there was no assignment to any other person.

Q. 99. What was the arrangement between you and Mr. McLaughlin under which that assignment was made?

A. Well, I have stated once that I could not undertake, at this

distance of time, to give you particulars. If I had had notice I could have been more precise, but it was only ten minutes before I saw you that I knew that my testimony was wanted.

117 Q. 100. What was the arrangement between you and Mr. McLaughlin and Mr. Newhall?

A. I don't know anything more definitely about it; that was the matter that least concerned me, and, as I am uncertain as to the conversation that took place, I cannot tell.

Redirect examination of EDWARD KIRKPATRICK by Mr. WISE:

Q. 1. At the time that Mr. Patterson made the assignment to Mr. McLaughlin do you knew whether he owed Mr. McLaughlin some thirty-odd thousand dollars?

A. He did, sir; he owed him some thirty-five thousand dollars.

Q. 2. And this assignment was made in connection with that indebtedness?

A. It was.

Q. 3. Do you know whether any assignment was ever made of this claim by Mr. Patterson except this one to Mr. McLaughlin?

118 Obj. (Objected to by respondent as immaterial and incompetent.)

A. I don't know of any assignment.

Q. 4. Do you know of any other assignment that Mr. McLaughlin ever made of this claim except to you?

A. No, sir.

Q. 5. Did you make any assignment to anybody else except to Mr. Newhall?

A. No, sir.

Q. 6. Do you know whether Mr. McLaughlin stated anything to you about assigning it to Mr. Newhall?

A. Yes, there was a conversation, but I can't undertake to repeat it, because I don't remember it. I have had so many conversations with them that I might get it mixed.

Q. 7. With regard to the assignment to Newhall, was it done by Mr. McLaughlin's direction and request?

A. It was the result of Mr. McLaughlin's request.

Ex. A. (Complainant puts in evidence the document referred to in this deposition purporting to be an assignment from W. H. Patterson to Charles McLaughlin, dated January 30, 1880; also
119 an assignment from Charles McLaughlin to Edward Kirkpatrick, dated April 7, 1880, and also an assignment from Edward Kirkpatrick to G. D. Newhall, dated April 7, 1880, marked "Complainant's Exhibit A."

Obj. Objected to by respondent on the ground that it does not relate to the matter in controversy; it is irrelevant and incompetent, and that it is not supported by any consideration.

Ex. B. Complainant also puts in evidence assignment from S. M.

Wilson to Mrs. Clara C. Crittenden, dated February 15, 1872, marked "Complainant's Exhibit B."

Due execution of the assignment, Exhibit B, is admitted by respondent.

120 Examination-in-chief of RUDOLPH STEINBACH (a witness on behalf of complainant).

By Mr. WISE:

Q. 1. What is your name?

A. Rudolph Steinbach.

Q. 2. You are with Mr. Le Roy, are you not?

A. Yes, sir.

Q. 3. Are you acquainted with Mr. Theodore Le Roy?

A. I am.

Q. 4. You were present at the taking of the account between Mr. Le Roy and the Estudillos and others in the third district court of the State of California in and for the county of Alameda?

A. I drew up accounts; I made the accounts myself.

Q. 5. Do you know what items went to make up the judgment that Mr. Le Roy got for the purpose of having the lands mentioned in that deed of trust sold?

Obj. (Objected to by respondent as incompetent.)

A. Yes, sir.

121 Q. 6. Do you know whether the amount which was due to William H. Patterson and the amount that was due to Wilson and Crittenden was included in that judgment.

Obj. (Objected to by respondent as incompetent.)

A. I do not. I don't know of any account that was due to those parties.

Q. 7. Do you know whether there was one hundred and nine thousand dollars included in that judgment to Patterson, to Wilson & Crittenden, and to Felton, or any amount?

Obj. (Objected to by respondent as incompetent.)

A. I don't know that there was anything due to these parties that you have mentioned. I have only information on the subject. I only have it from hearsay. I don't know it of my own knowledge.

Q. 8. You know that an amount that was due to them was included in that judgment, do you not?

A. No, sir. I can tell you that there was an amount of
122 one hundred and nine thousand dollars which was not due to Mr. Le Roy included in the judgment—that is, that was not for Mr. Le Roy's own use.

(Respondent objects to the above answer and moves to strike it out on the ground that it is incompetent.)

Q. 9. To whom was that one hundred and ninety thousand dollars due?

Obj. (Objected to by respondent as incompetent.)

A. I don't know; I have my belief about it.

P. Crittenden.

Examination-in-chief of PARKER CRITTENDEN, a witness on behalf of complainant, by Mr. WISE:

Q. 1. State your name and age.

A. My name is Parker Crittenden, and my age thirty-one years.

Q. 2. Do you know Mrs. Clara C. Crittenden?

A. I do.

Q. 3. You know her handwriting?

A. I do.

123 Q. 4. Look at the paper now shown you and state whether that is her handwriting.

A. That is her signature to the paper.

Cross-examination by Mr. BROOKS:

Q. 1. Do you know that this paper was made on the date which it bears?

A. I know that it was made during the month there mentioned.

Q. 2. You know that it was executed at the same time, during the month of May, 1880?

A. Yes, sir; I delivered it myself.

Ex. C. (Complainant puts in evidence the document above referred to, being assignment from C. C. Crittenden to G. D. Newhall, dated the — day of May, A. D. 1880, marked Complainant's Exhibit "C.")

(Continued until to-morrow, 31st instant, at 11 o'clock a. m.)

124 FRIDAY, *December* 31, 1880.

Present: Mr. Wise, solicitor for complainant; Mr. Brooks, solicitor for respondent.

Examination-in-chief of RUDOLPH STEINBACH (resumed) by Mr. WISE:

Q. 10. Do you know whether all the property mentioned in the original trust deed mentioned in the bill in this case has been disposed of?

A. It has.

Q. 11. When was it finally disposed of?

Obj. (Objected to by respondent as incompetent.)

A. What was not sold by Mr. Leroy was sold by one of the commissioners, on the 14th day of April, 1880, and by the other commissioner on the 1st day of May, 1880.

Q. 12. Who became the purchaser?

Obj. (Objected to by respondent as incompetent.)

A. Theodore Le Roy.

Q. 13. Have you the deeds to Theodore Le Roy in your possession?

125 A. I have the deeds, assignments of mortgage, and certificate of sale. I now produce them.

(The documents produced by the witness and above referred to are as follows:

1st. Deed from Benjamin H. Brooks, commissioner, to Theodore Le Roy, dated May 26, 1880, recorded July 1, 1880, in the records of the county of Santa Barbara, in book W of deeds, page- 37 to 42, inclusive.

2nd. Deed from Benjamin H. Brooks, commissioner, to Theodore Le Roy, dated May 26, 1880, recorded July 1, 1880, in the office of the recorder of San Luis Obispo county, in book M of deeds, pages 235 *et seq.*

3rd. Deed of Robert L. McKee, commissioner, to Theodore Le Roy, dated May 26, 1880, recorded June 23, 1880, in the office of the county recorder of Alameda county, in book 204 of deeds, page 54.

4th. Assignment of mortgages of Robert L. McKee, commissioner, to Theodore Le Roy, dated May 26, 1880, and recorded July

126 1, 1880, in the office of the county recorder of San Luis Obispo county, in book A of assignments of mortgages and leases, pages 188 *et seq.*

5th. Assignment of mortgages of Robert L. McKee, commissioner, to Theodore Le Roy, dated May 26, 1880, and recorded July 1, 1880, in the office of the county recorder of Santa Barbara county, in book A of assignments of mortgages, pages 409 to 414, inclusive.

6th. Certificate of sale of promissory notes, etc., by Robert L. McKee, commissioner, to Theodore Le Roy, dated May 26, 1880.

It is stipulated and agreed by and between the counsel for the respective parties that the returns of the conveyances made by the commissioners shall be received in evidence in place of the deeds themselves, with liberty to complainant's counsel, if he desires, to introduce full copies of the deeds.

Ex. Complainant puts in evidence copy of order of sale and

127 decree, one received March 10, 1880, addressed to Benjamin H. Brooks, Esq., commissioner, and filed on return May 1, 1880, in the clerk's office of the superior court, late third district court of Alameda county, the other addressed to Robert L. McKee, Esq., commissioner, received March 26, 1880, and filed on return May 17, 1880, in said office, made in the case of Theodore Le Roy *vs.* J. M. Estudillo, number 3180, in said court.

Also return of sale made by Benjamin H. Brooks, commissioner, filed May 1, 1880.

Examination-in-chief of JOHN B. MHOON (a witness on behalf of complainant) by Mr. WISE:

Q. 1. Mr. Mhoon, are you the person who was referee in the case of Theodore Le Roy, plaintiff, *vs.* Juana M. Estudillo and others,

defendants, in the district court of the third judicial district
128 of the State of California in and for the county of Alameda?

A. Yes; I was a refereee in that case.

Q. 2. Did you report the judgment in that case?

A. No; I reported proceedings of fact and conclusions of law, upon which the court subsequently rendered judgment.

Q. 3. Look at the judgment, as it appears upon page 388 of the printed transcript shown you, and state if you know what made up that judgment.

Obj. (Objected to by respondent as incompetent, irrelevant, and immaterial.)

A. (Referring to transcript.) I suppose that judgment was based upon the findings of fact and conclusions of law reported by me, appearing upon pages 306 to 310, inclusive, of this transcript.

Q. 4. Were these amounts due to Wilson & Crittenden, John B. Felton, and William H. Patterson included in that amount which you found to be due?

Obj. (Objected to by respondent as incompetent, irrelevant, and immaterial.)

A. That was the sum of forty-nine thousand dollars said
129 to *to* be due to Wilson & Crittenden, Patterson, and Felton, with interest on the same included in that judgment.

Q. 5. How much did it amount to?

A. The principal was forty-nine thousand dollars; I don't remember now how much the interest amounted to. The accounting would show, however, the aggregate, as the forty-nine thousand dollars was a part of the four hundred and forty-six thousand dollars upon which interest was calculated in gross.

Ex. (Complainant puts in evidence judgment roll in the case of Theodore Le Roy *vs.* Juana M. Estudillo.)

It is agreed that said judgment roll may be read from the transcript on appeal in said case. (See Transcript, Exhibit X.)

Cross-examination by Mr. BROOKS:

130 Q. 1. Mr. Mhoon, do you remember that you disallowed or pos-poned the commissions to Mr. Le Roy which were secured to him in the trust deed because, after the payment to him of all sums due for principal and interest, the forty-nine thousand dollars was to be paid with interest before the commission?

A. I think very likely that is the case, although I couldn't testify positively at this time.

(Complainant rests.)

131 WEDNESDAY, *February* 9, 1881.

Present: Mr. Wise, solicitor for complainant; Mr. Brooks, solicitor for respondent.

Ex. X. (By consent of respondent's solicitor complainant puts in evidence printed transcript on appeal in case number 65114, in the

superior court of the State of California, entitled Theodore Le Roy *vs.* Juana M. Estudillo *et al.* The said printed copy is accepted in place of and as equivalent to the original, marked "Complainant's Exhibit X."

The said transcript contains also the judgment roll in the said cause filed, which has heretofore — put in evidence.)

T. Le Roy.

Examination-in-chief of THEODORE LE ROY, a witness on behalf of respondent, Rudolph Steinbach sworn and acting as interpreter.

By Mr. BROOKS:

132 Q. 1. You are the plaintiff in the suit of Le Roy *vs.* Estudillo and others and the respondent in this suit?

A. Yes, sir.

Q. 2. What was your relation to the property described in the trust deed of the Estudillos to you at and prior to the time of the making of that deed?

Obj. (Complainant objects to any evidence as to the relation of the respondent to the property in question prior to the date of the deed referred to on the ground that the same is incompetent, irrelevant, and immaterial.)

A. I was the owner of four different mortgages on the property described in the deed of trust, including also some of the property which is not described in the deed of trust.

Q. 3. By whom were those mortgages negociated obtained from you?

Obj. (Objected to by complainant as incompetent and irrelevant.)

A. By John B. Felton.

Q. 4. Were they made all at the same time or at different times?

A. At different times.

133 Q. 5. What was the situation of the property at the date of the deed of trust?

A. The property was in the hands of the Hibernia Bank and in John B. Ward.

Q. 6. How was the property in the hands of the Hibernia Bank and John B. Ward?

A. Ward owed two mortgages to the Hibernia Bank.

Q. 7. How was it in the hands of John B. Ward?

Obj. (Objected to by complainant as incompetent, irrelevant, and immaterial.)

A. I don't know the details. I don't know how that was.

Q. 8. Was there any litigation pending about the property?

Obj. (Objected to by complainant as irrelevant, immaterial, and incompetent; that the record itself is the best evidence.)

A. There was a foreclosure suit commenced by the Hibernia Bank against Ward for the property.

Q. 9. Were you made a party to that suit?

134 Obj. (Objected to by respondent as *as* incompetent, irrelevant, and immaterial.)

A. I was.

Q. 10. Was there a suit at that time pending, brought by the Estudillo family against John B. Ward?

Obj. (The same objection by complainant.)

A. I belive so.

Q. 11. Who negotiated them—the agreement which resulted in the trust deed?

A. John B. Felton.

Q. 12. Can you state how the amount mentioned in that trust deed as consideration—the sum of $446,849—was made up?

A. (Referring to memorandum.) That sum was composed of the following items: A debt to the Hibernia Savings and Loan Society on two mortgages of John B. Ward, amounting to $218,372.12; of a debt to myself by the Estudillo family on four different mortgages, amounting to $71,592.58; of a payment to John B. Ward by myself of one hundred thousand dollars; of a payment to the Hibernia Bank, or to Richard Tobin, for the foreclosure suit, in which
135 the amount claimed was fifteen thousand dollars, but by compromise the amount actually paid being $7,500, and the payment of $447 in United States revenue stamps, which were charged as having cost $385, and the sum of forty-nine thousand dollars, which was understood to be for lawyers' fees.

Q. 13. Are the four documents now shown you the mortgages that were held by the Hibernia Savings and Loan Society?

A. No; these are prior mortgages which were afterwards released also. The two existing mortgages are described in this summons in the case of the Hibernia Savings and Loan Society *vs.* John B. Ward & others, which summons I now hold in my hand.

Q. 14. Was this summons delivered to you at the time of the settlement?

A. I don't know at what time exactly it was delivered to me.

Ex. 1. (Respondent puts in evidence the summons referred to, being the original summons in the case of the Hibernia Savings and Loan Society *vs.* John B. Ward and others, number 2356,
136 in the district court of the third judicial district of the State of California in and for the county of Alameda, marked "Respondent's Exhibit 1."

Obj. Complainant's solicitor offer*ing* no objection to the mode of proof, but objects to the fact sought to be proved by the introduction in evidence of the said summons as incompetent, irrelevant, and immaterial.

Q. 15. Is the paper now shown a release of those two mortgages, one dated April 11, 1866, and the other April 22, 1868?

A. Yes, sir; this is a release on those two mortgages.

Ex. 2. (The release above referred to is put in evidence by the respondent and marked "Respondent's Exhibit 2.")

Obj. Complainant's solicitor offers no objections to the mode of proof, but objects to the facts sought to be proved by the introduction in evidence of the said summons as incompetent, irrelevant, and immaterial.

137 Q. 16. Did the two mortgages of which Exhibit 2 is a release include or cover the four previous mortgages?

A. I believe so.

Q. 17. Did you ever obtain a release of those mortgages?

A. Yes, sir.

Q. 18. Were there other existing mortgages on the property made by the Estudillos to the Hibernia Bank?

A. I don't think so.

Q. 19. Look at the paper now shown you, which appears to be a release of certain mortgages to the Hibernia Bank made by the Estudillos of that property, and state whether or not you obtained the execution of a release of those mortgages?

A. I did.

Q. 20. Were those mortgages existing upon the property and unreleased when you obtained that release yourself?

A. Yes, sir; they were existing at the time when I obtained this release of them.

Q. 21. Does that instrument properly describe those mortgages?

A. Yes, sir; I believe it does.

138 Ex. 3. (The release of mortgages last above referred to is put in evidence by the respondent and marked "Respondent's Exhibit 3.")

Obj. Mr. WISE: We object to that as incompetent, irrelevant, and immaterial, but we do not require the production of the mortgages.

Q. 22. Mr. BROOKS: Of what was the debt of $71,592.29 composed?

A. (Referring to memorandum.) Firstly, of a first mortgage of $45,000, made by the Estudillo family to me; secondly, of a mortgage of $7,500, made by the same parties to me, which was designated as a lawyer's mortgage, and the money of which mortgage was paid to Felton, Patterson, Stowe, and Nugent, as attorneys, and Taylor for making abstracts of title.

Q. 23. What was that for?

A. I think it was paid to the lawyers for the work that they had to do.

Q. 24. What work had they to do?

Obj. (Objected to by respondent as incompetent and irrelevant.)

A. In the lawsuit which the Estudillo family had with
139 Mr. Ward. The balance of said sum of $71,592.28 was made up of two other mortgages of three thousand dollars each,

which were made by Mrs. Estudillo alone and were given on the homestead of the family; besides these sums there was the interest on them.

Q. 25. Were all of those mortgages made after the conveyance to Ward and after the controversy between the Estudillo family and Ward?

Obj. Mr. WISE: We do not object to the mode of proof, but we object to the facts sought to be proved as incompetent and irrelevant.

A. They were all made after the conveyance made by the Estudillo family to Ward and after the commencement of the suit referred to. The money received on these mortgages was used for the subsistence of the family during the pendency of that suit, with the exception of the $7,500, which was for the lawyers' fees in that controversy, and that money was paid to Mrs. Estudillo.

Q. 26. Mr. BROOKS: What was the one hundred thousand
140 dollars to be paid for?

A. Instead of continuing the suit referred to the lawyers made a compromise with Ward, and that was the amount paid him on account of that compromise.

Q. 27. What else was Ward to get on the compromise?

Obj. (Objected to by complainant as incompetent and irrelevant.)

A. I don't remember what kind of property he received besides.

Q. 28. Did he convey back to Mrs. Estudillo all the property which he had received from the Estudillos, or did he retain besides the hundred thousand dollars, [or] any portion of it; and, if so, what?

A. He did retain certain property in the San Leandro rancho, but as he made the conveyance to Mrs. Estudillo I did not pay particular attention to the details, and don't know exactly the property he did retain. I know he did retain a certain part for himself and some part for his children.

Q. 29. Do you know whether or not he retained the Rancho El Cajo or Puta de la Concepcion?

141 Obj. (Objected to by complainant as incompetent and irrelevant.)

A. He did.

Q. 30. I asked you at the beginning what was the situation of this property at the time that you entered into this agreement with John B. Felton to make this advance of the sum of $446,849, summing up what you have said, to see that I understand you correctly. I understand you to testify that the title was in Ward; that it was subject to mortgages to the Hibernia Bank, on which there was due $218,372.12; that it was subject to mortgages to you upon which there was due $71,592.58; that there was due to Tobin for the percentage in the foreclosure of the mortgages $15,000, for which he agreed to take $7,500; and that a compromise had been agreed upon

with Ward by which he was to reconvey to Mrs. Estudillo the property which he had received from the family upon the payment to him of one hundred thousand dollars, which had been
142 agreed upon by the lawyers in that suit by way of compromise, and Ward was to retain the Rancho El Cojo and some land in the Rancho San Leandro for himself and his children. Is that the summary of what you have stated as to the situation of the property at the time this agreement was entered into?

Obj. (Objected to by complainant as incompetent, irrelevant, as suggestive, and leading.)

A. Yes, sir.

Q. 31. In those negotiations which led to the making of the trust deed, with what persons did you confer and negotiate?

A. With John B. Felton.

Q. 32. Did you have any conversation with Wilson or Crittenden, or Patterson, Wallace, or Stow?

A. No.

Q. 33. Besides the sums which you have named as charged on the property at the time of this negotiation, what other sums were included in those accounts to make the sum of $446,849?

143 A. The negotiations between Felton and myself lasted about three months. At first I refused to make it alone. I explained to him that my position as second mortgagee was good enough for me; that I had nothing to fear, as I remained in that position as second mortgagee.

Obj. Mr. WISE: We object to this, and more to strike it out as not responsive.

Q. 34. Mr. BROOKS: First, please answer the question which I put to you.

(Q. 33 repeated.)

A. For stamps there were paid $385, and Mr. Felton told me that he had put into the mortgage a sum of $49,000 for the lawyers.

Q. 35. Now, please state the history of the negotiations which led to the making of this trust deed which you were giving when interrupted.

(Obj. Objected to by complainant as incompetent and irrelevant, and seeking to change a contract by parole evidence.)

A. The negotiations pending between Mr. Felton and myself in relation to this matter lasted about three months. I at first
144 refused entirely to listen to any such transaction as that, because I considered my position as second mortgagee as good enough for me, though after weeks and after talk both in Mr. Felton's office and my own office we at last arrived at a determination in the matter. Mr. Felton told me (to show me that he had a perfect confidence in the sufficiency of the security) that there was due to him and others about forty thousand dollars. Mr. Felton did not state the exact sum of forty-nine thousand dollars, which was afterwards stated, but at that time spoke of the amount as being about

forty-nine thousand dollars. That was what determined me upon entering into the business, Mr. Felton telling me, to show me the absolute confidence he had himself in the sufficiency of the security, and that I was perfectly safe in doing this business; that the sum of about forty thousand dollars was due to him and others, and that sum would not be paid to them until I should be entirely
145 paid for the advances I had already made, the advances I was to make, and any advances that I would make in the future, and the interest on them. That was the only thing that determined me, and I only consented with this express condition: that I should be entirely paid, as I have stated—capital and interest—on any advances, before this sum of about forty thousand dollars referred to should be paid.

Q. 36. When did Mr. Felton first mention or propose putting in this forty-nine thousand dollars?

A. It was mentioned at the time that I refused to do the business, but I don't exactly remember within a few days or a week or so; it may have been before the negotiations came to an end.

Q. 37. In whose behalf was Mr. Felton acting in making this negotiation with you?

Obj. (Objected to by complainant as incompetent and irrelevant, and on the ground that Mr. Felton's authority cannot be
146 shown by the testimony of the witness.)

A. I don't know in whose behalf Mr. Felton was speaking when he spoke of the sum of about forty thousand dollars that was due.

Q. 38. I refer to the negotiations which resulted in the trust deed.

A. Mr. Felton was acting for the Estudillo family.

Q. 39. Did he at that time occupy any relation of trust or confidence with you?

A. He did.

Q. 40. What relation?

A. He was my particular friend.

Q. 41. What was Mr. Felton's profession?

A. He was a lawyer.

Q. 42. Was he your counsel and adviser at that time?

A. Yes, sir; he was.

Q. 43. How long had he occupied that position?

A. For several years.

Q. 44. Did he possess your confidence?

A. He did.

Q. 45. Were your relations with him intimate?

A. Our relations were very agreeable; also they were business relations.

147 Q. 46. Does the document now shown you contain a correct statement of the matter of the deed of trust, of the moneys that went into it, and of the matters stated in it?

A. I have read it all and examined it all, and it is correct.

Ex. 4. (The paper last above referred to is put in evidence by the respondent and marked " Respondent's Exhibit 4.")

Obj. (Objected to by complainant as incompetant and irrelevant, and also as seeking to change a written contract.)

Q. 47. By whom was the trust deed drawn up—prepared?

A. I believe that it was prepared by Mr. Felton and Mr. Patterson.

Q. 48. What was the profession of Patterson and Stow?

A. They were lawyers.

Q. 49. What was the profession of Taylor?

A. I believe he was a liar.

Q. 50. Did you at the time of making this trust deed execute a release of the mortgages which you held?

A. I did.

Q. 51. The document now produced and shown you is that release, is it?

A. It is.

148 (Ex. 5. The release above referred to is put in evidence by respondent and marked " Respondent's Exhibit 5.")

Obj. (Objected to by complainant as incompetent and irrelevant.)

Q. 52. When the business was first proposed to you, was there anything said about advancing that sum of $49,000, or of including that in the mortgage or trust deed?

Obj. (Objected to by complainant as incompetent and irrelevant, as all the previous negotiations were merged in the deed.)

A. No. In the beginning there was never any mention of that sum of $49,000. It was in fact several months before it was mentioned.

Q. 53. Had the Estudillos any means to pay this forty-nine thousand dollars, or any part of it?

A. They had not.

Q. 53. What means of subsistence had they while this controversy was going on?

A. They lived on the money which I advanced to them.

Q. 55. Was any promise exacted from you at that time in
149 respect to providing for the support of the family after the making of the trust deed?

Obj. (Objected to by complainant as incompetent and irrelevant.)

A. Yes; there was.

Q. 56. What was it?

Obj. (The same objection by complainant.)

A. The sum of six thousand dollars was to be advanced to them in the course of the first year in sums of about five hundred dollars.

Q. 57. For the subsistence of the family?

Obj. (The same objection by complainant.)

A. Yes, sir.

Q. 58. What representations were made to you to induce you to make that promise?

A. Those gentlemen believed that the whole business could be wound up in the course of a year by sales of the property, and they wanted, of course, that during that year the family should have some money to live on.

Q. 59. (Q. 58 repeated.)

A. That it would require a year to liquidate the business.

150 Q. 60. Did they not represent to you that having transferred their entire estate, real and personal, to you, they had no means of subsistence, and therefore exacted this promise?

Obj. (Objected to by complainant as incompetent and irrelevant, and also as inquiring for representations of persons other than parties whose interests are involved in this suit.)

A. Yes, sir.

Q. 61. Did you make those advances according to that promise?

A. Yes, and even more.

Q. 62. Did you ever, at any time, seek, or desire, or urge the making of this trust deed?

A. No.

Q. 63. After it had been agreed to make this advance, was there also a demand made upon you for an advance of three thousand dollars?

Obj. (Objected to by complainant as incompetent and irrelevant.)

A. Yes, sir.

Q. 64. What reasons were stated to you for making that demand?

151 A. I don't remember now what reasons were given.

Q. 65. Was it stated to you at the time the deed was ready for execution that Mrs. Estudillo required the sum of three thousand dollars to pay some claims that she owed to the priests and some charity debts to defendants in the family, and insisted upon a promise that the sum of three thousand dollars should be advanced to her for that purpose?

Obj. (Objected to by complainant as incompetent, irrelevant, and as leading, and not inquiring as to the party making the statement.)

A. I have never been told anything about it. This is the first time I have heard anything about it. I knew the family for many years, but at no time did they ever mention any such thing to me.

Q. 66. After the execution of the deed of trust did Patterson continue to act as counsel to the Estudillo family?

Obj. (Objected to by complainant as incompetent and irrelevant.)

152 A. He did, and he has been paid by me for it.

Q. 67. Did you receive the letter from Mr. Patterson now shown you?

A. Yes, sir.

Q. 68. Is the signature to that letter Mr. Patterson's signature?

A. Yes, sir; the whole letter is in his writing.

Ex. 6. (The letter above referred [to] is put in evidence by respondent and marked "Respondent's Exhibit 6.")

Q. 69. To what business does the letter, Exhibit 6, refer?

A. It was intended to make a large sale at auction of the San Leandro property, and that sale also came off, but it did not succeed.

Recess until 2 o'clock p. m.

153 *Afternoon.*

Present; Mr. Wise, solicitor for complainant; Mr. Brooks, solicitor for respondent.

Examination-in-chief of THEODORE LE ROY (continued) by Mr. BROOKS:

Q. 1. Did you receive the letter and enclosed telegram now shown you from Mr. Patterson?

A. I did.

Ex. 7 and 8. (The letter and telegram above referred to are put in evidence by respondent and marked, respectively, "Respondent's Exhibits 7 and 8.")

Obj. (Objected to by complainant as irrelevant and immaterial.)

Q. 2. To what business does that refer?

Obj. (The same objection by complainant.)

A. It refers to the changing of the county seat from San Leandro to Oakland.

Q. 3. What was Mr. Nugent's relation to the affair and to the family?

154 A. Mr. Nugent went to Sacramento to prevent the removal of the county seat from San Leandro to Sacramento. It had been agreed that for his services there he should be paid about five hundred dollars. At the time that I received this telegram and letter there had already been paid to him something like four thousand dollars. He was the lawyer of the family, and after consultation, with the consent of the other lawyers of the family, he went to Sacramento to attend to that affair.

Q. 4. Was he connected with the family?

A. He was one of the members of the family.

Q. 5. Had he married one of the daughters?

A. He married one of the daughters of Mrs. Estudillo.

Q. 6. Had he general management of their affairs—the affairs of the family?

A. He was charged with the management of the business of the family.

Q. 7. Was he the ordinary means of communication be-
155 tween the family and yourself?

A. He was.

Q. 8. Was he entrusted with the business at Sacramento of resisting the passage of the law for the removal of the county seat from San Leandro at this time?

Obj. (Objected to by complainant as irrelevant and immaterial.)

A. He was.

Q. 9. Was the San Leandro rancho a part of the property conveyed by the trust deed?

A. That part of the town which was not sold was a part of the property in the trust deed.

Q. 10. Was it considered that the removal of the county seat from San Leandro would injure the value of the remaining unsold portions of the San Leandro rancho?

Obj. (Objected to by complainant as irrelevant and immaterial.)

A. It was so considered.

Q. 11. Why did Nugent telegraph to Patterson at this time that he should make you telegraph to him immediately, and that
156 the delay was most mischievous and hazardous?

A. This referred to a sum of $750 which he had asked to be sent to him.

Q. 12. Why does Nugent telegraph to Patterson and not to you?

A. He had telegraphed to me, but I had refused to do anything because he was going too far with the expenditure. I had already advanced $4,200.

Q. 13. Did you have any conversation with Patterson at this time in regard to these advances?

A. Yes, sir.

Q. 14. What was that conversation?

Obj. (Objected to by complainant as irrelevant and immaterial.)

A. I had spoken to Mr. Felton as well as to Mr. Patterson about making these advances to Nugent, and I explained to them that if the expenditure went on like that that they could not possibly be paid their own forty-nine thousand dollars.

Q. 15. Did you represent this to Mr. Patterson?

A. Yes; to Mr. Patterson and also to Mr. Felton.

Q. 16. What said Mr. Patterson and Mr. Felton?

157 A. Mr. Patterson told me that I need not be afraid at all; there was no danger whatever; that the value of the property was greater than I had any idea of; there was no danger that we should not be paid. Mr. Patterson at that time remarked to me that the rancho Guadalupe alone would be sufficient to pay me.

Q. 17. Did you receive the letter now shown you from Mr. Patterson, and is it in his handwriting, signature and body?

A. I received this letter. It is entirely in his handwriting.

Ex. 9. (The letter above referred to is put in evidence by respondent and marked "Respondent's Exhibit 9.")

Q. 18. What business does that refer to?

A. To the patent of the Gaudalupe rancho.

Q. 19. Was that in regard to efforts being made at Washington to induce the Land Department to send for delivery the patent of the Guadalupe rancho which had been executed and sent here and then recalled to Washington without delivery?

158 A. It was for that business.

Q. 20. Did you receive from Mr. Patterson the letter now shown you?

A. I received this letter.

Ex. 10. (The letter last above referred to is put in evidence by respondent and marked "Respondent's Exhibit 10.")

Q. 21. Did you receive the letter from Patterson now shown you?

A. Yes, sir.

Q. 22. What is the contemplated sale which is referred to in that letter?

A. The sale referred to was one of all the lands in the rancho San Leandro which were lying between the Central Pacific railroad and the bay.

Ex. 11. (The letter last above referred to is put in evidence by respondent and marked "Respondent's Exhibit 11.")

Q. 23. What was the amount that that land was proposed to be sold for?

A. I am not sure. I think it was two hundred and seventy-seven or two hundred and eighty-seven thousand dollars.

159 Q. 24. Did the sale take place; and, if not, why not?

A. Mr. Nugent had put an injunction against the sale, and when the injunction was dissolved the parties who wanted to buy it backed out and did not want to buy it.

Q. 25. Was Nugent acting alone in that matter or with the family?

A. Himself.

Q. 26. He did it alone, did he?

A. He was alone in asking for the injunction. All the rest of the family consented to the sale. Even Mrs. Nugent, the wife of John Nugent, consented to the sale. Except himself, everybody was satisfied.

Q. 27. And Patterson?

A. Patterson, too; every one was satisfied; Felton also. A deposit had to be made by the purchaser.

Q. 28. In addition to these letters of Patterson, were the orders in *in* writing and assented to by Patterson in writing—the orders on you to pay money?

160 Obj. (Objected to by complainant as irrelevant and immaterial.)

A. Almost always. For several years it was Patterson who approved the payments.

Q. 29. With the exception of the conversation that you have related with Patterson, do you remember ever having any conversation with Patterson with respect to the terms of the trust touching the forty-nine thousand dollars?

A. No, never.

Q. 30. Did you ever inform Mr. Patterson that the forty-nine thousand dollars was included in the trust deed?

A. I think not.

Q. 31. Did you and Mr. Felton, together, ever inform Mr. Patterson that his claims were included in that deed?

A. I don't think so.

Q. *31.* Did you have any conversation with Mr. Patterson with regard to the question of priority of payment during the past year, or within the past two years?

A. I remember nothing of the kind, except on the occasion that I have mentioned in reference to the county seat. I don't
161 think I ever spoke with Mr. Patterson about that at all.

Q. 32. Have you, within the last year or two years, had any conversation with Mr. Patterson on the subject of that forty-nine thousand dollars?

A. No.

Q. 33. Did you employ Mr. Patterson in the business of the trust, in the law business relating to the land conveyed?

A. Yes.

Q. 34. Do you remember what business that was—what suits?

A. He acted with Mr. Felton and Mr. Nugent in the case of Jamison.

Q. 35. Le Roy *vs.* Jamison and others in the circuit court?

A. In the case of Le Roy against Jamison in the circuit court.

Q. 36. And Le Roy *vs.* Clayton?

A. Le Roy *vs.* Clayton also, I think.

Q. 37. Did you pay him as trustee for his services in those suits?

A. Yes, sir.

Q. 38. How much did you pay him?

A. I remember I paid five thousand dollars.

162 Q. 39. Was he employed by you in the matter of getting the patent from Washington?

A. No; it was Mr. Nugent. The contract was made with Nugent at the satisfaction of the lawyers, Mr. Felton and Mr. Patterson. Mr. Nugent himself went to Washington for that purpose. He stayed, I think, about three or four months in Washington.

Q. 40. Did you receive the letter now shown you from John Nugent?

A. Yes, sir.

(Ex. 12. The letter last above referred to is put in evidence by respondent and marked "Respondent's Exhibit 12.")

Obj. Mr. WISE: I object to that as being irrelevant and immaterial, and not relating to the controversy here.

Q. 41. Mr. BROOKS: Did you, as requested in this letter, show this letter to Mr. Felton and Mr. Patterson?

A. Yes, sir.

Q. 42. What advice did they give you in regard to it?

A. Their advice was not to even answer it.

Q. 43. What did you say in regard to the fact of the equity
163 of Mr. Nugent's claim?

A. At that time they did not wish to pronounce themselves on it; did not want to judge of it.

Q. 44. What did they say in regard to the statement contained in this letter that the other counsel fees were to be paid after your debt should be paid?

A. They made no objection; they did not even mention it.

Q. 45. At the time that you took this property in hand was it in the hands of a receiver?

A. It was in the hands of Mr. Robinson, who was the receiver.

Q. 46. Was there controversy in regard to the amount of his compensation then pending?

A. Yes; there was.

Q. 47. Was that controversy determined and the amount thereby settled paid by you after the making of the trust deed?

A. I paid the price of the judgment. The judgment was bought in the name of Mr. Alfred Borel.

Q. 48. Judgment in favor of Robinson?

164 A. Robinson got a judgment, sold the San Leandro rancho, bought it in, made an assignment to Borel, and I took an assignment from Borel and took the deed and paid Borel the money.

Q. 49. What was the purpose and reason for the provision in the eighth article of the trust deed that your commissions should not be deducted or charged until all payments above mentioned are made?

Obj. Mr. WISE: I object to that as irrelevant and incompetent; an attempt to parole testimony; to interpret and explain a written instrument.

A. That was on account of what came to the lawyers; that I was not to get my two and a half per cent. commissions until the lawyers had been paid.

Q. 50. Mr. BROOKS: Did you give Mr. Patterson the information which he requested in those several letters which have been put in evidence?

A. That information was given by Mr. Steinbach.

165 Q. 51. Were Patterson and Felton kept generally informed in regard to the condition of the trust and the trust property?

A. Certainly; always.

Q. 52. Did they know that you were receiving considerable sums of money?

A. Yes, sir.

Q. 53. At the time you commenced your suit for the foreclosure of the trust did you file with your complaint accounts showing all the receipts and payments made by you?

A. Yes; I did.

Q. 54. Mr. Felton was your attorney in that case in commencing the suit?

A. Mr. Felton was in the beginning.

Q. 55. Did Mr. Patterson appear in that case; and, if so, for whom?

A. I don't know.

Q. 56. Did either Patterson, Wilson, Crittenden, or Felton ever at any time ask you to pay to them anything on the account of

moneys received by you, or any share of those moneys on account of the forty-nine thousand dollars?

A. No.

166 Q. 57. Were you examined as a witness in the case of Le Roy *vs.* Estudillo?

A. Yes.

Q. 58. Were you examined by Mr. Sharp, acting as counsel for the defendant, in respect to this forty-nine thousand dollars?

A. I was.

Q. 59. Did Patterson and Crittenden read that testimony?

A. I think so.

Q. 60. Who was present there on behalf of the defendants at the time you gave that testimony?

A. Mr. Sharp, Mr. Crane, and Mr. Nugent; Mr. M-hoon was the referee.

Q. 61. Did not James L. Crittenden call upon you in consequence of reading that testimony?

A. Yes; he came to the office several times.

Q. 62. Did you state to him then the terms of the trust in regard to the forty-nine thousand dollars and the conditions upon which it was to be paid?

A. I don't think that I spoke to him; I don't remember. He had written letters, and I referred that to Mr. Steinbach.

167 Q. 63. Was there any communication between you and Mr. Patterson in respect to that testimony?

A. No.

Cross-examination of THEODORE LE ROY by Mr. WISE:

Q. 1. Mr. Le Roy, you have spoken of forty-nine thousand dollars, counsel fees, to Patterson, to Felton, and to Wilson & Crittenden, as making up part of the $446,849. What part of that belonged to Mr. Felton, what part to Mr. Patterson, and what part to Mr. Wilson and Crittenden?

A. I understood when Mr. Felton explained it to me that of that there was twenty-five thousand dollars coming to Mr. Felton, twelve thousand to Mr. Patterson, and twelve thousand to Crittenden and Wilson.

Q. 2. When did Mr. Felton explain it to you?

168 A. Several months after the deed of trust had been made.

Q. 3. You knew Mr. Felton and Mr. Patterson and Mr. Wilson and Mr. Crittenden had no connection as partners at all, did you not?

A. I think not.

Q. 4. You knew that the forty-nine thousand dollars was to be divided into three sums, one of which Mr. Felton was to get, one of which Mr. Patterson was to get, and one of which Crittenden and Wilson were to get, did you not?

A. In the beginning, I think not.

Q. 5. Did you think that Mr. Felton was to get all of the forty-nine thousand dollars in the beginning?

A. I believed that Mr. Felton and Mr. Nugent were to get a part

of it, and perhaps other people, but I did not know exactly the terms.

Q. 6. Did you not know at the first that Mr. Patterson was interested in it, and that Mr. Wilson and Mr. Crittenden were interested in it?

169 A. I always thought that Patterson was to have something, but as for Crittenden and Wilson I never knew it.

Q. 7. Did Mr. Felton not tell you what the forty-nine thousand dollars counsel fees was for?

A. Never.

Q. 8. Did nobody ever tell you?

A. No; I remember nothing of the kind.

Q. 9. Have you ever paid Mr. Felton any part of the forty-nine thousand dollars?

A. Nothing; not anything.

Q. 10. Have you ever made any agreement with him about it?

A. Never.

Q. 11. Did you have no understanding with him about it?

A. No understanding whatever, excepting what was in the letter which he made me write to him.

Q. 12. Did Mr. Patterson have anything to do with the advising that a trust deed should be taken?

A. I don't believe so.

Q. 13. Are you sure of it?

170 A. I am not sure; I don't believe he had. All matters were made between Mr. Felton and myself; no other person.

Q. 14. Why, then, did you testify in your direct examination that Mr. Felton and Mr. Patterson advised the execution of the trust deed—did you testify so?

A. No.

Q. 15. Have you ever had any agreement or understanding with Mr. Patterson or Mr. Crittenden about their proportion?

A. None, whatever.

Q. 16. You said in your direct examination that the Estudillos had no money to pay the forty-nine thousand dollars. How do you know that?

A. I had all the property they had. I don't know of any property that they had besides what was transferred to me.

Q. 17. Is it possible for them to have had any property without your knowing it?

171 A. There was nothing to make me suppose that they had any property, and I have always believed that they had no property whatever.

Q. 18. I ask you if it is possible for them to have had property without your knowing it?

A. I always understood from this, that Mrs. Estudillo came to me for the money to live with—it was clear enough and sufficient proof to me that they had no other property.

Q. 19. I ask you this question: Could they have had property without your knowing it?

A. They might have property; I could not say.

Q. 20. In the judgment that you got against the Estudillos to foreclose your claim and to have the property sold did you not count in two and a half per cent. commissions?

Obj. Mr. BROOKS: I object to that; the judgment will speak for itself.

A. I don't think so.

Q. 21. Mr. WISE: Did the judgment include the forty-nine thousand dollars with interest?

A. I don't know anything about it.

172 Q. 22. For what purpose did Mr. Nugent go to Sacramento; was it to attend the Legislature in order to prevent the county seat from being removed?

A. It was to prevent the removal of the county seat.

Q. 23. What was he to do at Sacramento?

A. It had been thought proper by the lawyers to send him up.

Q. 24. Was he to lay the matter before the Legislature in any shape or form?

A. Probably it was his duty to do all he could to prevent the removal of the county seat.

Q. 25. How much money did you give Mr. Nugent to spend at Sacramento about this matter?

Obj. Mr. BROOKS: I object to that He has not said that he gave him any money to spend there.

A. During all the time that he was at Sacramento that may have cost me something like forty-eight hundred or five thousand dollars.

Q. 26. Mr. WISE: About how long was he there?

173 A. He may have stayed about a month, but not much more than a month, I think.

Q. 27. How much money did you send to Washington to get the patent returned?

A. It would be very difficult for me to remember that. I should be required to look at the accounts.

Q. 28. To whom was the money sent?

A. By telegraphic transfers.

Q. 29. To whom?

A. To the order of Mr. Nugent.

Q. 30. Where was Mr. Nugent?

A. At Washington. All the sums that were paid to Nugent, either at Sacramento or when he was in Washington, were approved by the lawyers. I have never paid a cent otherwise.

Q. 31. Who was Mr. Williams that was spoken of in one of the exhibits which has been put in evidence?

A. I think he was the one who was afterwards Attorney General. I think he was from Oregon.

Q. 32. Was he Senator at that time?

174 A. I really don't know.

Q. 33. Now, you say that you never informed Mr. Patter-

son that the forty-nine thousand dollars was included in the deed of trust, do you not?

A. I don't remember that I ever spoke to Mr. Patterson in reference to it, except on the occasion that I have mentioned.

Q. 34. What occasion was that?

A. On the occasion of Nugent's letter about the county seat. I spoke to Patterson about it once when it was the question about paying something to Nugent. I spoke to him about the time, on the occasion of the removal of the county seat, and I also spoke to him when I showed him the letter of Nugent's about it.

Q. 35. Are those the only two times you spoke to him?

A. I don't remember any other.

Q. 36. Did you not keep Mr. Patterson and Mr. Felton informed as to the condition of the property?

175 A. I always informed Mr. Felton, and Mr. Felton communicated it to Mr. Patterson.

Q. 37. How do you know that he communicated it to Mr. Patterson?

A. Mr. Felton told me so. Mr. Felton often told me that he had told Patterson what I had told him.

Q. 38. Why did he tell Mr. Patterson; do you know? Was it because he was interested or because he was attorney for anybody?

A. Because he was interested, and he was the attorney of the family.

Q. 39. You speak of Mr. Felton as being your counsel. Did not you have other counsel besides Mr. Felton at different times?

A. Yes; I have had other lawyers.

Q. 40. At the time this deed of trust was entered into did not you have other counsel besides Mr. Felton?

A. No; I had no other counsel.

Q. 41. Did you not have other counsel that you were in the

176 habit of consulting about some things?

A. No.

Q. 42. Had nobody been your counsel but Mr. Felton up to that time since you had been in California?

A. I have had other lawyers, but it was never like Felton. Felton I considered as a friend.

Q. 43. Was any writing given to you at the time the deed of trust was entered into showing that the forty-nine thousand dollars was to be paid after you were paid?

[A.] ——.

Q. 44. My relations with Mr. Felton were such that I was satisfied with his word. It was properly understood that the lawyers should all be paid after I was entirely paid.

Q. 45. That is not an answer to the question. I ask you if there was any writing given at the time showing that the lawyers were to be paid after you were paid?

A. I believe not, because my position with Felton was such

177 that he would have given me anything at any time if I had asked him.

Q. 46. Did you have any notes or obligations from the Estudillos showing how much they owed you besides the deed of trust?

A. I have got accounts—I had about that.

Q. 47. You had the note and mortgages belonging to the Hibernia Bank showing $218,372.12, did you not?

A. I think I have them at the office, but I don't remember. After they were released they must have been the property of the Estudillos and I don't think I had them.

Q. 48. Have you the notes and mortgages representing the $715,592.58—have you got them now, or did you ever have them?

A. At the execution of the deed of trust all those were returned.

Q. 49. Did you take a receipt from the Hibernia Bank for the payment of the $218,372.12?

A. I have had several receipts for money I paid at different times.

178 Q. 50. You had receipts, then, for the payment of that full amount from the Hibernia Bank?

A. Certainly; I had a release of the mortgages.

Q. 51. Did you take a receipt from Ward for the payment of the hundred thousand dollars that you paid to him?

A. It must have been the family that took that. I could not have had a receipt and also a deed of trust. If I buy a piece of property and I give my money I don't get a receipt, but I get the property.

Q. 52. Did you pay Mr. Tobin the seventy-five hundred dollars and take a receipt?

A. All that must have been put in the account of the bank.

Q. 53. That was a separate sum from the $218,372.12, was it not?

A. It was a separate sum. The seventy-five hundred dollars were not paid by me to Mr. Tobin directly, but to the bank.

Q. 54. With regard to the communication you had with

179 James L. Crittenden, was it all in writing?

A. I always, when Mr. Crittenden came to the office to see me, I always referred him to Mr. Steinbach.

Q. 55. Is that all the communication you had with Mr. Crittenden—to refer him to Mr. Steinbach?

A. All the communication was in writing.

180 Re-examination of RUDOLPH STEINBACH (on behalf of respondent) by Mr. BROOKS:

Q. 1. Mr. Steinbach, what is your business?

A. I am in the real estate business.

Q. 2. What relations have you had with Mr. Le Roy and the property in the trust deed described in the complaint here?

A. I have had the management of his property since September or October, 1871.

Q. 3. Did you occupy the same office or room with Mr. Le Roy prior to the date of that deed?

A. I did.

Q. 4. Were you present at any of the negotiations which led to it?

A. In the month- of August and September, 1870, I several times was present when Mr. Felton and Mr. Le Roy spoke of this subject.

Q. 5. Who was it that proposed the business?

181 Obj. (Objected to by complainant as immaterial.)

A. Mr. Felton was very urgent that Mr. Le Roy should do this business—make this transaction.

Q. 6. How long did these negotiations continue?

A. I came back from the East at the end of July, 1870, and on the very day of my arrival Mr. Le Roy spoke to me on the subject and told me that he was considerably troubled about it, and told me that negotiations had been pending for some time—for how long I could not say.

Q. 7. Well, did they continue from that time forward?

A. From that time they continued until the deed of trust was executed.

Q. 8. What was the cause of the delay?

Obj. (Objected to by complainant as immaterial.)

A. Mr. Le Roy did not want to advance any more money than he had advanced on the four mortgages which he held at that time.

182 Q. 9. How often was Mr. Felton with him about this business?

A. I could not say how many times Mr. Le Roy was in Mr. Felton's office about it, but I can remember three or four occasions when Mr. Felton was in Mr. Le Roy's office on this business when I was present.

Q. 15. When was the first time that you heard mention of the forty-nine thousand dollars?

Obj. Objected to by complainant as incompetent, irrelevant, and immaterial.

A. That was just about the time of the date of the deed of trust, within a few days of its execution, that the exact sum of forty-nine thousand dollars was mentioned.

Q. 11. When did you first hear of the idea of including in this trust the provision for the lawyers?

A. I can't state precisely the date, but it was mentioned at the very first occasion that Mr. Felton spoke to Mr. Le Roy in my presence about the trust deed or about the transaction.

183 Q. 12. Will you repeat the conversation that took place on that occasion, as near as you can?

Obj. (The same objection by complainant.)

A. Mr. Felton tried to explain to Mr. Le Roy the excellence of the investment which he urged him to make. He explained to him particularly the value of the San Leandro rancho and of the other ranchos that were to be transferred to him. He showed him, or gave him, a statement in detail of the lands in San Leandro made by Mr. Stratton. The valuation showed him that that ranch alone

would be sufficient to pay the advance which he was called upon to make. But Mr. Le Roy still hesitated. Then Mr. Felton told him that he certainly ought to be satisfied with the security, since he and the other lawyers interested were satisfied that the money that was owing to them from Estudillos would be paid after he, Mr. Le Roy, should be entirely paid, and that they were not likely to do
184 that if they did not think the property was amply sufficient to pay both him and them, and, in fact, he said that he had no doubt that the Estudillos themselves would still have a good deal of property left after everybody was paid.

Obj. (The same objection by complainant.)

A. Mr. Felton tried to explain to Mr. Le Roy the excellence of the investment which he urged him to make. He explained to him particularly the value of the San Leandro rancho and of the other ranchos that were to be transferred to him. He showed him or gave him a statement in detail of the lands in San Leandro made by Mr. Stratton. The valuations showed him that that ranch alone would be sufficient to pay the advance which he was called upon to make. But Mr. Le Roy still hesitated. Then Mr. Felton told him that he certainly ought to be satisfied with the security, since he and the other lawyers, were satisfied that the money that was owing
185 to them from Estudillos would be paid after he, Mr. Le Roy, should be entirely paid, and that they were not likely to do that if they did not think the property was amply sufficient to pay both him and them, and, in fact, he said that he had no doubt that the Estudillos themselves would still have a good deal of property left after everybody was paid.

Obj. (Answer objected to by complainant as not responsive to the question and asked to be stricken out.)

Q. 13. Was that subject recurred to in those conversations between that and the final settlement?

A. It was the great argument used by Mr. Felton in every conversation that he had with Mr. Le Roy in my presence on the subject. Mr. Le Roy was hesitating and afraid to go into it. Mr. Felton always used this argument, with other arguments, with regard to the sufficiency of the security over and over again, and he
186 insisted particularly and repeatedly on this, that Mr. Le Roy ought to be satisfied with the securities, since they were satisfied to have him paid entirely first before they could get a dollar.

Q. 14. When did you take charge of the management of this trust property?

A. It was in September, 1871; the end of September, 1871; about a year after the date of the deed of trust, when I made an agreement with Mr. Le Roy in reference to the management of the estate.

Q. 15. Did you have any interviews with Mr. Felton then in regard to this forty-nine thousand dollars?

A. I had. In examining the deed of trust and the property that Mr. Le Roy at that time had, the accounts and vouchers and other papers he had at that time, I did not see among the papers any

paper stating precisely the conditions of the forty-nine thousand dollars—in fact, no paper that showed that there was any
187 part of the sum mentioned in the deed of trust that belonged to anybody but Mr. Le Roy. I thereupon made the remark to Mr. Le Roy that there ought to be such a paper; that those who were interested in the forty-nine thousand dollars which did not belong to him ought to have such a paper, and he himself ought to have a paper from them stating the conditions. He agreed with me, and I thereupon went to Mr. Felton and told him that I had found no such paper, and that there ought to be such a paper, and if there had not been one made it ought to be made then and there, and he then and there drew up——

Q. 16. Mr. WISE (interrupting): Then and there drew up what?

A. Drew up a letter which he proposed that Mr. Le Roy should sign, a draft of which I have here now.

Q. 17. Mr. BROOKS: Produce it.

A. (Produces.)

Q. 18. This is in Mr. Felton's handwriting?

A. It is all in his handwriting; done in my presence.

188 Ex. 13. (The draft of the letter above referred to is put in evidence by respondent, and marked "Respondent's Exhibit 13.")

Obj. Objected to by complainant as incompetent, irrelevant, and immaterial, as being after the trust deed was executed, as not being authorized by Messrs. Patterson or Wilson.

Q. 14. Proceed with your answer.

A. I then went to my office and made two letters of that letter and Mr. Le Roy signed them.

Q. 15. How did you get the draft?

A. Mr. Felton gave me this draft and requested me to make two copies of it, have Mr. Le Roy sign them, and bring them to him. I did so. I went to the office, made two copies, had Mr. Le Roy sign them, and brought them to Mr. Felton. One of them I left with him and the other he returned to me after writing the sentence which appears at the bottom, "This is the true understanding about the above interests. John B. Felton. September 27, 1871."

Ex. 14. (The copy of letter last above referred to is put in evidence by respondent and marked "Respondent's Exhibit 14.")

189 Obj. (Objected to by complainant as incompetent, irrelevant, and immaterial, as being after the trust deed was executed, as not being authorized by Messrs. Patterson or Wilson, and, moreover, as not being a copy of the original draft of letter Exhibit 13.)

Q. 16. Was this letter, Exhibit 14, dated on the day that it was written and signed?

A. It was.

Q. 17. Did you in 1870 have a conversation with Lloyd Tevis on the subject of this forty-nine thousand dollars?

A. I had.

Q. 18. What was that conversation?

Obj. (Objected to by complainant on the ground that the conversation is immaterial and irrelevant; that Mr. Tevis has no authority to act for anybody.)

A. Mr. Tevis stopped me on the street one day in September, 1870, before I had taken charge of the management of the property, and asked my opinion as to whether it would be safe or profitable for him to buy the claim of forty-nine thousand dollars which was
190 owned by some lawyers, as he said, and which was to be paid out of the Estudillo estate after Le Roy had been paid. He told me that he had been applied to to buy that claim at a good round discount, and wanted to know what I thought of such an investment. He mentioned at the time that John Nugent had come to him with it. I gave him my opinion at that time, which was not favorable; told him that unless the property was sold very soon, and at very good prices—higher prices than I thought could be expected—there would not be property enough left to pay it.

Q. 19. Did you have a conversation with Mr. Samuel Wilson and John Nugent in Washington, in 1873, on this subject?

A. I had. I conferred repeatedly with Mr. Nugent in reference to the matter of the patent of the Guadalupe ranch.

Obj. (Conversation objected to by complainant as incompetent, irrelevant, and immaterial.)

191 A. We both were trying to obtain that patent. One day I met Mr. Samuel Wilson——

Mr. WISE: One moment. So far [as] the conversation goes I object to it as irrelevant and immaterial; also as being subsequent to the execution of the deed.

A. (Continuing.) I was in company with Mr. Nugent and met Mr. Samuel Wilson, and both myself and Mr. Nugent tried to induce him to help us as much as he could in the matter of the Guadalupe patent. I gave him as my opinion that if the land which was at that time in dispute which was not covered by the old patent, and which was included in the new patent which we were trying to obtain, that if that piece of land were lost to the estate of the Estudillos I saw no chance whatever that he, Mr. Wilson, would ever get anything for his interest in the forty-nine thousand dollars; that the property would not be sufficient to pay Mr. Le Roy, and
192 consequently that he could get nothing. Mr. Wilson made no reply to that. Mr. Nugent only said that he had no doubt that there was plenty of property left, even if that was lost. Mr. Wilson then told us that he could not possibly stay in Washington; he had to go back to New York; and we did not get his aid in that matter.

Q. 20. Mr. BROOKS: Did you have any conversation with Mr. Patterson in regard to that forty-nine thousand dollars?

A. Yes; what we generally called the lawyers' fees, by which we meant the forty-nine thousand dollars, was several times alluded to

in conversation I had with Mr. Patterson, and I remember particularly that, in connection with our discussions in reference to obtaining that patent of the Gaudalupe ranch, that I, in Mr. Le Roy's interest, hesitated to arrange and to make the agreement with John Nugent to send him to Washington, an agreement by which Mr. Le Roy was to have paid a pretty large sum of money to Nu-
193 gent; that Mr. Patterson on that occasion told me that if Mr. Le Roy did not wish to do that, let him make over that piece of land which is in dispute there in the Guadalupe ranch, and we will take care of it and we will take it in payment of our counsel fees.

Q. 21. After the trust deed was made what was Mr. Patterson's connection with the business?

A. Patterson continued to act as counsel for the Estudillos. He was the person in San Francisco with whom I, who represented Mr. Le Roy, regularly and frequently consulted on all matters having reference to that estate. He advised me in reference to drawing up leases or making contracts in reference to the land. In fact I kept him constantly informed, so as to have his approbation of all that was being done in and about that estate.

Q. 22. Were his approvals of advances for payments generally in writing or by parole?

A. They were for the first two or three years in writing.
194 Before Mr. Le Roy would pay any large sum he would have Mr. Patterson approve the payment of it in writing.

Q. 23. How?

A. Generally by writing the word "Correct," and signing his name to it on the bills that were to be paid.

Q. 24. How often did you converse with him in respect to matters of the trust?

A. Up to the time of the commencement of the foreclosure suit of Le Roy against the Estudillos I made it a practice to see him weekly, and sometimes, on certain occasions, daily.

Q. 25. Did Mr. Felton intervene in these matters at all?

A. He did not intervene in them; he did not pay attention to the details except when payments of large sums were to be made, and then either Mr. Le Roy or myself consulted with him about it.

Q. 26. Did any one up to the time of the reference in the case of Le Roy against Estudillo ever make any claim, to your knowl-
195 edge, that the forty-nine thousand dollars was to be paid *pro rata*, or that anything was to be paid on it until Le Roy was paid in full?

A. No one ever made any suggestion that that claim should be paid *pro rata*. It was only at the reference, or during the reference, that Mr. James L. Crittenden ever spoke to me. His theory was that it should be paid *pro rata*. I frequently had conversations with Mr. Felton and Mr. Patterson, and incidentally that forty-nine thousand dollars would be alluded to, but it was always perfectly understood, and it was not subject to any question, and no doubt was ever expressed that that forty-nine thousand dollars would not come after Le Roy should be entirely paid. Whenever it was alluded to

at all it was treated as a matter of course, and it was not in fact mentioned; it was treated as a matter of course. We all knew it; it was not mentioned in so many words, and it was after writing that
196 letter of Mr. Le Roy's, of the 27th of September, 1871, that I knew exactly how the matter stood. There never was any question made and there was no occasion to make any question.

Q. 27. Who filed the bill in Le Roy against Estudillo and others?

A. Mr. Felton was of counsel. I think the bill was filed in the name of Newhall & Carsons, as attorneys. It was drawn up under the supervision of Mr. Felton. I had frequently occasion to see him about it at that time.

Q. 28. Do you know who appeared for the defendants there?

A. Mr. Patterson at first appeared for the defendants.

Q. 29. Did you have any conversation with John Nugent in regard to this forty-nine thousand dollars and the time and manner of its payment?

Obj. (Objected to by complainant as incompetent, irrelevant, and immaterial.)

A. Yes; had several conversations.

Q. 30. Is he alive or dead?

A. John Nugent is dead.

Q. 31. What were those conversations?

Obj. (The same objection by complainant.)

A. The first conversation I had with him was when he was
197 trying to sell that claim, as I incidentally found out afterwards from conversation with Mr. Tevis; he was trying to sell it to Mr. Tevis. And he and I discussed the chances of his being able to sell it or have it discounted at anything like fair terms, or terms that he could accept. We then very fully discussed the nature of the claim. He was particularly familiar with this, that this forty-nine thousand dollars could only be paid if there was sufficient property there to pay Le Roy first, and should only be paid after Le Roy was entirely paid. I always thought, I felt convinced in my mind, do now, that he had a part of that forty-nine thousand dollars, and that he had a part of the twenty-five thousand dollars which Mr. Felton was to have.

Obj. (Answer objected to by complainant as irresponsive, and moved to be stricken out.)

Q. 32. Can you relate the conversation you had with John Nugent following your interview with Mr. Tevis?

A. I can't fix that exactly in my mind. John Nugent and I
198 were thrown together so often after that *that* time, because it was just about that time that I took the management into my hands, that it would be difficult and impossible for me to say precisely when it happened and what happened then; but this I remember, that he tried to impress me with the belief that there would be property enough, after paying Le Roy and after paying the claim

of forty-nine thousand dollars, to leave the Estudillos still rich; that one of the ranchos, meaning the San Leandro and Guadalupe ranchos—either one of the ranchos would be sufficient to pay off the whole indebtedness of the Estudillos.

Q. 33. Was he at that time connected with the business of the rancho; and, if so, how?

A. He was left the attorney-in-fact of the Estudillo family. He took particular charge of the Guadalupe rancho and went there very frequently; went there with the surveyor who subdivided the rancho and commenced negotiations for sales or leases of the land in that rancho.

199 Q. 34. Did you converse with him offering to sell this forty-nine thousand dollars—to negotiate it?

Obj. (Objected to by complainant as incompetent, irrelevant, and immaterial.)

A. He spoke to me about it and tried to convince me that the lawyers ought not to lose a great deal; that it was a good security after all; that they ought to get money on that without losing much, and that he was particularly anxious to have that done, because then he and the Estudillo family would get something—the lawyers would let them have a part of what they got for the assignment of that forty-nine thousand dollars—and he seemed to be very anxious indeed to bring that about.

Q. 35. Have you examined the records of Alameda county and obtained the particulars of the mortgages which where held by Le Roy?

A. I have.

Q. 36. Have you that memorandum?

A. This is the memorandum of that (exhibiting memorandum).

200 Q. 37. Is this a correct abstract from the records of those mortgages?

A. It is.

Ex 15. (Respondent puts in evidence the abstract last above referred to, marked "Respondent's Exhibit 15.")

Obj. (Objected to by complainant as irrelevant and immaterial.)

Q. 38. Was there any note or anything in writing given to show the advances made by Mr. Le Roy for which he held this deed as security other than the deed itself?

A. No; not that I am aware of.

Continued until to-morrow, 10th instant, at 10 o'clock a. m.

THURSDAY, *February* 10, 1881.

Present: Mr. Wise, solicitor for complainant; Mr. Brooks, solicitor for respondent.

Cross-examination of RUDOLPH STEINBACH by Mr. WISE:

201 Q. 1. Are you interested personally in defeating this suit?

A. I am not. My contract with Mr. LeRoy excluded all

interest in the forty-nine thousand dollars. The contract which I made with him in 1871, when I took the management of the Estudillo property, especially excluded all the forty-nine thousand dollars. I have no interest whatever in this suit.

Q. 2. If the complainant in this case should succeed in getting a part of this property, would you be a loser thereby?

A. I should not lose or gain anything at all.

Q. 3. Is your contract with reference to this property in writing—the property mentioned in the trust deed?

A. It is.

Q. 4. Where is it?

A. I have it at home.

Q. 5. I would like to see it.

A. I will show it to you.

Q. 6. Prior to 1871 were you interested or connected with Mr. LeRoy in this business?

A. No, sir; that is, in this Estudillo business.

202 Q. 7. When did you first become interested?

A. From the time that I made the contract. It was first spoken of about the end of September or the beginning of October, 1871.

Q. 8. At once you commenced to investigate to see how the matter stood, as I understand you?

A. My contract with Mr. Le Roy is dated in the beginning of October. It was before I signed my contract with him that I investigated the condition.

Q. 9. Was this letter that Mr. Le Roy addressed to Mr. Felton, that was dictated by Mr. Felton, signed before you made your agreement with Mr. Le Roy?

A. It was. I should like to refer to my contract. My impression is that the contract is dated in the beginning of October, and if it is then this letter of Mr. Le Roy's, and Mr. Felton's signing it also, was done before my contract was signed. (Refers to a copy of contract.) My contract with Mr. Le Roy was dated on the 23d of October, 1871.

203 Q. 10. Do you know why the name of Mr. Le Roy and the writing by Mr. Felton bear a fresher look than the body of the letter?

A. I am not aware that it bears a fresher look. I have already sworn that it was signed on that day; that Le Roy signed it on that day and Mr. Felton (after examination of Exhibit 14). No, sir; it shows that it is written in different ink from the body of the letter. I wrote the body of the letter and Mr. Le Roy signed it, evidently with different ink from that in which I wrote the body of the letter, and Mr. Felton's writing is also writ-en in different ink from what I used in writing the body of the letter.

Q. 11. Where did you write the body of the letter for Mr. Le Roy to sign?

A. I wrote it in Mr. Le Roy's office.

Q. 12. Where did Mr. Le Roy sign it?

A. In his office.

Q. 13. That would be the same ink, would it not?

A. No, sir; not necessarily. One is written with copying
204 ink and the other is written in common ink, I should judge. I have no doubt that was so.

Q. 14. Is that the only explanation you can give?

A. That is all I can say about it.

Q. 15. Now, is the body of this letter in your handwriting?

A. The body of the letter is in my handwriting, the signature of Mr. Le Roy is in Mr. Le Roy's writing, the writing of Mr. Felton is in Mr. Felton's writing, and the signature also, and the date of it, and I saw them both sign that on that day—that is to say, on the 23d of September, 1871—and I have had occasion to show that letter through the last seven or eight years several times to different parties, and to you in particular.

Q. 16. You knew at the time that Mr. Felton signed this that Mr. Wilson and Mr. Crittenden and *that* Mr. William H. Patterson *was* interested, did you not?

A. I simply copied what Mr. Felton had written out for
205 me. At the time it was signed [I] of course learned the particulars as they are stated in that letter. I did not know the particulars before. I only knew before that forty-nine thousand dollars did not belong to Mr. Le Roy, but that Mr. Felton had to say all about that, and to designate to whom that forty-nine thousand dollars was to be paid if it ever was to be paid.

Q. 17. From whom did you learn that the forty-nine thousand dollars belonged to other parties?

A. From Mr. Felton and Mr. Leroy, in conversations which they had several times in our office *to-* together in my presence.

Q. 18. Now, I will repeat the question: At the time that you got Mr. Felton to sign that memorandum at the bottom did you not know that Messrs. Wilson and Crittenden were interested, and Mr. William H. Patterson was interested, in that forty-nine thousand dollars?

A. I certainly knew it, because I wrote the letter myself; it was Mr. Felton's draft of the letter which I copied.

206 Q. 19. You were personally acquainted with William H. Patterson and also with Messrs Wilson and Crittenden, were you not?

A. I was not at that time acquainted with Crittenden and Wilson, but I was acquainted with William H. Patterson; I may have seen Crittenden and Wilson.

Q. 20. Where was Mr. Felton's office at the time this was signed?

A. I think it was already at the corner of Clay and Montgomery streets at that time, but I am not sure about that.

Q. 21. Where was Mr. Patterson's office at that time?

A. I think it was in Sacramento street, where it is now.

Q. 22. Where was Mr. Wilson's office at that time?

A. I never knew where Wilson's office was; I can only remember that there was the office of Wilson & Hoge, in Montgomery block, years ago, but I never had any occasion to go to their office nor to Crittenden and Wilson's office.

207 Q. 23. Was not Wilson's office at that time on California street?

A. I can't say; it may have been.

Q. 24. How far from Felton's office was Patterson's?

A. About two blocks.

Q. 25. How far from Felton's office was Leidesdorff street, corner of California?

A. About three blocks.

Q. 26. Was there any suggestion made at the time by you or by Mr. Felton that Mr. Patterson, Mr. Wilson, and Mr. Crittenden ought to sign this paper?

A. I suggested that to Mr. Felton myself; he said that he would take care of that; there was no necessity for it, as he had entire charge of all that business.

Q. 27. Did you see Mr. Wilson, Mr. Crittenden, or Mr. Patterson if that was correct?

A. I did not.

Q. 28. Did you ever tell either of them that you had this paper?

A. No, sir.

Q. 29. Your object in getting this paper was to put Mr. Le Roy in a safe position?

208 A. No, sir; it was to establish in writing the condition of the forty-nine thousand dollars both for Mr. Le Roy's sake and for the sake of those who were interested in the forty-nine thousand dollars.

Q. 30. If your object was to give those who were interested a paper showing their interest, why did you not give Mr. Patterson, Mr. Wilson, and Mr. Crittenden a copy?

A. I gave it to all of them in giving it to Mr. Felton. The letter is addressed to all of them. In handing the letter—that is, the duplicate of the letter—to Mr. Felton I considered I handed it to all of them.

Q. 31. When you had the interview with Wilson in Washington, as you have spoken of, did you tell them then the character of the interest that he had or mention this letter to him?

A. No, sir; I simply mentioned to him, assuming that of course he was perfectly familiar with the letter and with his interests and the nature of them, that if Le Roy should lose the land in

209 dispute, the Guadalupe ranch, that, in my opinion, they, the lawyers interested in the forty-nine thousand dollars, would not get anything. Mr. Wilson made no reply in reference to that; he only said that he had no time to attend to that business which he proposed he should help us, at Washington, with; that he had to go to New York; that he had to go to New York that very evening, I think he said.

Q. 32. Has Mr. Le Roy kept any books showing amounts of money paid about this ranch and this trust?

A. Certainly.

Q. 33. Do those books show any payments to Mr. Felton at any time since that?

A. Mr. Le Roy and Mr. Felton had several transactions together;

Mr. Felton occasionally borrowed money, and Mr. Felton and Mr. Le Roy were interested in some speculations—for instance, in a city gas company, where Mr. Le Roy advanced the money; they were also interested together in land in the San Pablo ranch,
210 where Mr. Le Roy advanced the money, and in that way they had a number of transactions together in the course of the last eight years or more.

Q. 34. Outside of those business transactions that they had together do Mr. Le Roy's books show any payments to Mr. Felton of any sums of money?

A. None whatever; that is too general, I find. Mr. Felton, I recollect, occasionally borrowed money from Mr. Le Roy, and to some extent what he may have borrowed from him would appear on Mr. Le Roy's books, and also the sums that he repaid to him.

Q. 35. Do you know now, generally, how Mr. Le Roy's books show the state of the accounts between Mr. Felton and Mr. Le Roy—is Felton indebted to Le Roy a large amount of money?

A. Felton, when he died, was indebted to Le Roy in a pretty large sum of money according to the accounts; but Le Roy held at that time and has now, as security, a large amount of property in
211 the San Pablo ranch, which, when realized, will probably more than pay that debt.

Q. 36. How much was Felton indebted to Le Roy; was it an amount greater than Felton's interest in this forty-nine thousand dollars with the interest on it?

A. That is impossible for me to tell without looking at the account. I never had the slightest interest in that account, and paid no attention to it. It is only incidentally that I ever knew anything about it.

Q. 37. I am merely asking you, generally, whether it would be about as much as Felton's interest in the forty-nine thousand dollars, with interest, or whether it would be more or less. I want to get a general idea. I am speaking about the amount Felton owed him. Would it absorb all of his interest in the forty-nine thousand dollars with the interest thereon?

A. I have already stated that the San Pablo ranch, which
212 Le Roy holds as security for Felton's debt, I believe will more than pay that debt.

Q. 38. Well, outside of securities that he held in his hands, did Felton owe Le Roy an amount that equaled Felton's interest in the forty-nine thousand dollars?

A. Please state what Felton's interest in the forty-nine thousand dollars was that you refer to.

Q. 39. Don't you know what the letter was that Mr. Le Roy addressed to Mr. Felton?

A. I don't know at what time; it would require calculation; twenty-five thousand; interest from the first of March, 1870, to date, I don't know what date you mean.

Q. 40. I mean the date of Felton's death.

A. When did he die?

Q. 41. In 1877.

A. Very well then; let us calculate the interest at one and one-quarter per cent. on twenty-five thousand dollars from the first of October, 1870, to the day of his death, and you are as well capable to figure that as I am.

213 Q. 42. Were any loans made to Mr. Felton by Mr. Le Roy after this deed of trust was executed?

A. I don't know that without referring to the accounts.

Mr. BROOKS: I don't think you have any right to testify to the contents of those books. Matters within your knowledge you have a right to testify to.

A. Well, I have stated that I don't know without looking at the accounts.

Mr. BROOKS: I advise the witness that he has no right to testify to matters which he merely knows from inspection of Mr. Le Roy's books.

Q. 43. Mr. WISE: Now, your connection with this transaction commenced with your investigations prior to entering into the contract yourself with Mr. Le Roy in 1871. Is that correct?

A. My direct connection with the estate of the Estudillos commenced from September, 1871.

214 Q. 44. You knew nothing prior to that time as to the fact of the forty-nine thousand dollars being included in the deed of trust for the benefit of these other parties?

A. On the contrary, I knew all about it.

Q. 45. When did you first know that?

A. I knew it from the conversations, during which I was present, between Le Roy and Felton, during the months before the execution of the deed of trust.

Q. 46. Those two months were September and August?

A. August and September, 1870.

Q. 47. Then you heard Mr. Le Roy and Mr. Felton talk the matter over during those two months?

A. Yes, sir; several times.

Q. 48. Did you know at that time that forty-nine thousand dollars was to go into this deed of trust for the benefit of those lawyers?

A. I knew at that time that about forty thousand dollars was to go into the deed of trust for the benefit of these lawyers. The exact sum of forty-nine thousand dollars was only settled within the last few days before the execution of the deed of trust.

215 Q. 49. Did you see the deed of trust before it was signed?

A. I did not.

Q. 50. When did you first see the deed of trust?

A. As soon as Mr. Le Roy got it into his hands after it had been recorded.

Q. 51. About what time was that?

A. That was within a month after its execution.

Q. 52. Did you read it then?

A. Yes, sir; and I remember even that I made some remarks

about it to Mr. Le Roy, and stated to him that there was some conditions in it which I did not like.

Mr. BROOKS: Confine yourself to answering questions.

Q. 53. Mr. WISE: Did you tell Mr. Le Roy at that time or did you observe that there was no difference expressed in the deed as to the different items that were to be paid?

A. I did not.

Q. 54. Did you not observe that the deed of trust did not provide that the payment of the forty-nine thousand dollars was to
216 be pos-poned in payment to any other claim?

A. I made no observations to Mr. Le Roy about that at that time.

Q. 55. Did you observe it in the deed?

A. There is nothing in the deed that is mentioned of the forty-nine thousand dollars.

Q. 56. You said in your direct examination that it was a great argument with Mr. Felton on all occasions that they were to be paid last—that is, the lawyers were. Was that the principal reason that he gave to Mr. Le Roy for entering into the arrangement?

A. That was his argument to show to Mr. Le Roy that the lawyers had confidence in the estimate of the value of the property on which he was asked to advance money.

Mr. BROOKS: Answer the question.

A. It was not the principal reason.

Mr. WISE: Was it stated by Mr. Felton, in any of those interviews which you say you heard, that the deed of trust was to show that they were to be paid last?

217 A. No, sir.

Q. 57. Did Mr. Le Roy or yourself know at that time—that is, prior to the deed of trust—that Mr. Crittenden and Mr. Wilson and Mr. Patterson would be interested in the sum that was to go into the deed of trust for lawyers?

A. I, for one, did not know, and I am quite sure that Mr. Le Roy did not know, because it was never mentioned in my presence, either by Mr. Felton or Mr. Le Roy.

Q. 58. When did you first learn that anybody else but Mr. Felton was interested in that?

A. I first learned it positively when Mr. Felton wrote the draft of that letter which I have already referred to.

Q. 59. What do you mean by learned it positively?

A. That is, I learned the details of it; the exact sums.

Q. 60. Then you did know prior to that that others were interested?

A. Certainly.

Q. 61. Did you know that others were interested prior to
218 the deed of trust being executed; not how much, but that they were interested?

A. Yes; because I heard Mr. Felton speak about the others.

Q. 62. And Mr. Le Roy knew it too?

A. Evidently.

Q. 63. And you and Mr. Le Roy both knew that Crittenden and Wilson and Patterson were interested, but without knowing the exact sums prior to the deed of trust being executed?

A. I can't say now whether either Mr. Le Roy or I knew that, but my impression is that I considered at the time that it was so.

Q. 64. You knew it from the conversations that passed between Mr. Felton and Mr. Le Roy in your presence, did you not?

A. If I knew anything it was from those conversations, but I can't remember now whether the names of those lawyers that you have mentioned were especially mentioned by Mr. Felton or whether I had previous notice of the lawsuit pending between Ward and the Estudillos.

219 Q. 65. You stated in your direct examination that you kept Mr. Patterson always informed as to the state of the matters after your connection with it. Why did you keep him informed?

A. He was the counsel of the Estudillo family and in fact held a power of attorney from them, and he it was to whom I had to apply for advice in matters that referred to the Estudillo family or in which they were interested.

Q. 66. Did you keep him informed because he was interested personally as counsel for the Estudillos?

A. No, sir; that was not the reason. The reason was the one which I have already stated.

Q. 67. In your direct examination you stated that no one ever made any suggestion that the forty-nine thousand dollars was to be paid *pro rata* with the amount due to Mr. Le Roy. Can you give the exact language that you have heard with reference to that? I am not asking you to give it, Mr. Steinbach; I know you
220 cannot give it; all I expect to get is that you will say that you cannot give it unless you can.

A. Of course I can't give any exact language.

Q. 68. Your testimony, then, was an inference in your own mind from what you had heard rather than pretending to give any exact statements that had been made; is that correct?

A. No, sir; it was more than that, because both with Mr. Le Roy and with Mr. Felton the question of security was after[wards] discussed by me, and Mr. Felton particularly spoke of his chances of getting his money, and particularly when Mr. Felton told me that Mrs. Crittenden had applied to him to buy her interest in the forty-nine thousand dollars. Mr. Felton at that time asked me whether it was safe for him to pay two thousand dollars for that interest, and I told him that I did not think it was safe; so necessarily we must have spoken of the circumstances, although it was not necessary for either
221 Mr. Felton and myself or Mr. Patterson and myself to distinctly state so, because we all knew perfectly well how the condition was.

Q. 69. Was that the only conversation that you have ever had about that matter that you remember of?

A. Do you mean the one Mr. Felton had with me about Mrs. Crittenden's application to buy her out?

Q. 70. No; about the *pro rata*.

A. I never, with Mr. Felton or Mr. Patterson, spoke of any *pro rata* payment—never. It was only the son of Mrs. Crittenden who first suggested to me that he had a theory that he could make Mr. Le Roy pay *pro rata;* that was the first time at all that any *pro rata* payment was mentioned to me.

Q. 71. That was the year 1877, was it?

A. It was either in 1877 or 1878.

Q. 72. That was the first time, then, that a *pro rata* had ever been mentioned that you are aware of?

A. By anybody; yes, sir.

Q. 73. Was it ever mentioned afterwards that you remember of?

222 A. I think it was mentioned by Mr. Patterson in his examination in this case, wasn't it? I don't remember.

Q. 74. Mr. Steinbach, do you know where William H. Patterson's deposition was taken?

A. Yes, sir; I was present.

Q. 75. Where was it?

A. On the San Pedro ranch.

Q. 76. How far from San Francisco?

A. I don't know; about twenty miles from San Francisco.

Q. 77. The way you get there is by a very sandy, disagreeable road, is it not, from the school-house station?

A. I think it is a very pleasant drive to that place.

Q. 78. The road is very sandy from the school-house station for several miles, is it not, and are you not compelled to go in a walk?

A. In the summer time it is sandy in some places, and driving rapidly may not be as easy as it would be in the winter.

Q. 79. You were here yesterday when Mr. Le Roy was examined?

A. I was.

Q. 80. You acted as interpreter?

223 A. I did.

Q. 81. Do you know whether the lands included in the deed of trust have depreciated in value to any very great extent since the deed of trust was given?

A. Certain properties have depreciated considerably in value.

Q. 82. Which properties have depreciated?

A. The Guadalupe ranch, for instance, appreciated considerably after the deed of trust was executed, and it has depreciated since very considerably, and the San Leandro ranch, which has been estimated to be worth four hundred dollars per acre, never was worth that either at that time or since.

(Continued until Saturday, 19th instant, at 10 o'clock a. m.)

SATURDAY, *February* 19, 1881.

(Further continued by consent until Wednesday, March 2, 1881, at eleven o'clock a. m.)

224 WEDNESDAY, *March* 2, 1881.

Present: Mr. Wise, solicitor for complainant; Mr. Brooks, solicitor for respondent.

Examination-in-chief of EDWARD J. M. ARMSTRONG (a witness on behalf of respondent) by Mr. BROOKS:

Q. 1. You reside in this city?
A. I do.
Q. 2. You are upwards of twenty-one years of age?
A. I am.
Q. 3. What is your business?
A. Clerk in the office of B. S. Brooks.
Q. 4. Did you, at my request, take an abstract of the answer filed in the case of Estudillo against Ward?
A. I did.
Q. 5. Is the document which you now produce such abstract?
A. It is.
Q. 6. Is it a correct and faithful abstract of the answer referred to?
A. It is.

225 Ex. 16. (The abstract above referred to is put in evidence by respondent in the place and stead of the original record, marked "Respondent's Exhibit 16.")

Cross-examination by Mr. WISE:

Q. 1. From what did you make this abstract?
A. I made it from the original on file in the office of the clerk of the late district court of Alameda county.
Q. 2. How did you make the abstract?
A. I took the complaint, and I took also the original answer on file, and I looked to see what was denied in the answer, and then I put in: "Here follows a denial of the allegations in the complaint, line so and so, page so and so, to line so and so, page so and so;" then I went on and took the original matter which was set up in the answer, and put a short abstract of that into the document.

226 Q. 3. Does this document show every material thing that was denied and every affirmative matter that was set up in the answer?
A. Yes, I believe it does.

Obj. (The introduction in evidence of the abstract above referred to is objected to by complainant as incompetent, irrelevant, and immaterial; but complainant consents that the said abstract shall be taken and used in this case with the same force and effect as the original answer would have if introduced.)

Redirect examination by Mr. BROOKS:

Q. 1. What other proceedings are there in the case of Estudillo against Ward?
A. The proceedings are very long and the papers are very numer-

ous, and they consist to a great extent of accounts by the receiver—very numerous accounts.

Q. 2. There was no trial of the case itself on the issues joined?

A. No, sir; there was some trial or some proceedings as to
227 the receiver's accounts, but upon the main issue joined there was never any trial.

Q. 3. But there was an order of dismissal?

A. Yes, sir; of which this which I now produce is a certified copy.

Ex. 17. (The said certified copy of the order of dismissal of the case of Estudillo *vs.* Ward, above referred to, and discharge of receiver's sureties is put in evidence by respondent and marked "Respondent's Exhibit 17.")

Q. 4. All the other proceedings, I understand you, Mr. Armstrong, relate to the receiver and his accounts?

A. Yes, sir.

Q. 5. On the paper now produced, and being a printed copy of complaint, explain changes made in it in red ink.

A. The red ink changes are those which were made in the amended complaint, the additions which were made in the amended complaint.

Q. 6. Without the red ink it is a copy of the original complaint?

A. It is a copy of the original complaint.

228 Q. 7. As changed in red ink it is a copy of the amended complaint?

A. Yes, sir.

Ex. 18. (The copy of amended complaint in the case of Estudillo *vs.* Ward, above referred to, is put in evidence by the respondent, and marked "Respondent's Exhibit 18.")

Obj. (Objected to by complainant as incompetent, irrelevant, and immaterial; but complainant interposes no objection, upon the ground that the copy is not certified.)

Q. 8. What is the paper now shown you?

A. It is a correct abstract of the proceedings in the case of the Hibernia Savings and Loan Society *vs.* John B. Ward *et al.* in the third judicial district court — Alameda county. I compared this with the papers on file in the clerk's office, and it is correct.

Ex. 19. (Respondent puts in evidence the abstract last above referred to, marked "Respondent's Exhibit 19.")

Obj. (Objected to by complainant as incompetent, irrelevant, and immaterial; but complainant consents that the said paper shall be taken and used in this case with the same force and effect as the original record would have if introduced.)

229 Re-examination of RUDOLPH STEINBACH (on behalf of respondent) by Mr. BROOKS:

Q. 1. What are these two statements now shown you?

A. The first is a statement showing the amounts received to the credit of the judgment in the case of Le Roy *vs.* Estudillo *et al.* and

the amount of the deficiency. The second is a statement showing the amount received by Theodore Le Roy upon the judgment in the case of Le Roy *vs.* Estudillo and others and the amount of the deficiency on the amount due him personally.

Q. 2. Are those two statements correct?

A. They are.

Q. 3. Made up by yourself?

A. Made up by myself.

Ex. 20, Ex. 21. (Respondent puts in evidence the two statements above referred to, marked, respectively, "Respondent's Exhibits 20 and 21.")

230 Q. 4. At the time of the making of the trust deed was all the land in possession of the grantors and did it all come into Mr. Le Roy's possession as trustee?

A. It was not entirely in possession of the grantors and did not come entirely into Mr. Le Roy's possession, as trustee, when the trust deed was made.

Q. 5. What property was that that you referred to as not being in possession of the grantors?

A. That was a large part of the Guadalupe rancho. It was not in possession of the grantors at the time the deed was made.

Q. 6. Did Le Roy obtain possession; and, if so, how?

A. Mr. Le Roy afterwards obtained possession after suit in ejectment in the United States circuit court.

Q. 7. Did he institute a suit?

A. He did.

Q. 8. After the trust deed was made?

A. After it was made.

Q. 9. Who was his attorney in that suit?

A. Mr. Patterson was the attorney in the suit, and I think
231 Mr. Felton was counsel. The suit was Le Roy *vs.* Clayton *et al.* There was also a suit of Le Roy *vs.* Jamison and others.

Q. 10. What property did that concern?

A. That concerned a large part of the Guadalupe rancho.

Q. 11. Was Mr. Patterson attorney in that suit also?

A. Yes; Patterson and Felton were the attorneys in that suit.

Q. 12. And Mr. Le Roy recovered judgment in those suits and possession of the property?

A. He did.

Q. 13. Did Mr. Le Roy pay Mr. Patterson for that business; and, if so, how much?

A. Mr. Le Roy paid Patterson five thousand dollars after the suit of Le Roy *vs.* Jamison was terminated on account of his services in that suit and other services rendered to him as trustee for that property.

Q. 14. Has all the property which was conveyed to Le Roy in trust been sold by him?

A. Yes; it has been sold.

232 Q. 15. Are the results of these transactions shown by these two statements which you have last produced?

A. Yes, sir.

Recross-examination of RUDOLPH STEINBACH by Mr. WISE:

Q. 1. From what did you make up these two statements?

A. I made them up from the originals—that is, I started with the amount found due by the decree and the amount of the judgment, and I calculated the interest, and I deducted the amounts which were received by the plaintiff from the commissions. The proceeds of sales—all from the official papers on file in the case.

Q. 2. When you say you calculated the amount from the decree what decree do you mean?

A. The decree in the case of Le Roy *vs.* Estudillo—the foreclosure suit.

233 Q. 3. The item "claim of lawyers, forty-nine thousand dollars," which you have here in one of these statements, was a claim of Felton, Patterson, Wilson, and Crittenden, was it not?

A. Yes; that is the claim of these three lawyers.

Q. 4. And the interest you have calculated on it is up to the time of the judgment?

A. Yes, sir.

Q. 5. Mr. Le Roy's commissions, which are included in the judgment, those are mentioned in a clause of the trust deed; do you know which?

A. No; it is one of the clauses of the trust deed in which Mr. Le Roy was allowed a commission.

Q. 6. You calculated the interest on the amount due Mr. Le Roy personally from January 10, 1879, the date of the first sales by the commissioners?

A. Yes, sir.

Q. 7. Did Mr. Le Roy buy all of this property at the sale?

A. Yes; Mr. Le Roy was purchaser of all the property sold by the commissioners.

234 Q. 8. Does he own it now?

A. Partly—that is, the greatest part of it.

Redirect examination by Mr. BROOKS:

Q. 1. Mr. Steinbach, what means other than such are usually employed by the sheriff for giving notice of sales did you employ on behalf of Mr. Le Roy in that case of Le Roy *vs.* Estudillo?

A. Mr. Le Roy had notices of the sale posted in a great many places, both on the San Leandro rancho and the Guadalupe rancho, and also on the Cosmali rancho.

Q. 2. Did you direct those notices to be posted?

A. I directed them to be posted.

Q. 3. Where did you direct them to be posted?

A. I should have said that I had them also posted in several places in Oakland and in several places in the town of San

235 Luis Obispo and in several places in the town of Santa Barbara and in some of the settlements or towns in the neighborhood of each of those ranchos; I directed them to be posted at the post office in each of those places that I have named; at the court-house doors of Oakland, Santa Barbara, and San Luis Obispo;

at numerous hotels and public places in Oakland, San Luis Obispo, and Santa Barbara, and particularly also at the ranch-house, at the Guadalupe, at the post office, and every public place of Guadalupe, and in some of the neighboring villages; also along the roads in the Guadalupe; put them almost everywhere.

Q. 4. Did you direct them to be posted generally where they would be most likely to attract notice?

A. The object of posting them was to put them where they were most likely to attract attention.

Q. 5. How long before the sale was that done?

A. That was done at least four weeks before the sale.

(Respondent rests.)

(Continued until Wednesday, March 30th, 1881, at 10 o'clock a. m.)

236 WEDNESDAY, *March* 30, 1881.

Present: Mr. Wise, solicitor for complainant; Mr. Brooks, solicitor for respondent.

Examination-in-chief of F. W. EATON, a witness on behalf of complainant, by Mr. WISE:

Q. 1. Mr. Eaton, are you acquainted with the building at the southeast corner of Clay and Montgomery streets?

A. Yes, sir.

Q. 2. What is your connection with that building and how long have you been so connected?

A. Well, sir, I am one of the owners; interested in the ownership of the property; have been since the death of my father, in 1866.

Q. 3. Are you the agent for the building?

A. Yes, sir; I collect all the rents; have charge of it exclusively.

237 Q. 4. Did you know John B. Felton during his life?

A. Yes, sir.

Q. 5. Do you know when Mr. Felton moved into that building and had an office there?

A. Well, I know when the estate of Pioche moved in there; Mr. Felton was with them. Mr. Felton never paid any rent directly to me, though he had an office with them there in the building. I collected the rent of the Pioche estate always. The arrangement was made with them for the renting of the rooms.

Q. 6. What time did the Pioche estate and Mr. Felton move into that building?

A. About the 18th they paid me the rent—from the 18th of December, 1873, fifty dollars, to the 1st of January, 1874; it was a part of the month of December; they moved in about that time—a day or two of that time.

Q. 4. How long did he continue in that building after that, if you know?

238 A. He was there, sir, up to the time of his death. I would'nt state because —. What time did he die; do you recollect the date?

Q. 8. I do not remember when.

A. I don't know. I think—in fact, I am positive—that he was there, because they moved out after his death into the adjoining building to us, over the bank.

Q. 9. What time was that building commenced to be built; do you remember?

A. I think it was commenced in February or March, 1873; my impression is it was in February or March, 1873; it might have been March or April; I couldn't tell exactly. Considerable portion of the building was rented before it was finished, completed, to several tenants; the store portion of it, the ground floor, was occupied before the upper portion, the officers, were completed. My impression was that the offices were completed about August; I think something like that.

Q. 10. Have you examined your rent-book to see if those dates were correct?

239 A. I examined it as to the payment of rent from the Pioche estate. I did not examine it closely to see exactly the month that the building was finished. I don't think I have any particular record to show exactly the date that it was completed, but it was commenced in the fore part of the year 1873, and, I think, fully completed by the first of August—at the outside, 1st of July. Rents were paid, however, for May and June and July and all along through that year as the building was occupied from time to time.

Q. 11. You have a correct record of the time it was occupied by the Pioche estate?

A. Yes—that is to say, my record shows the payment of their first rent, which the entry on my memorandum book shows. On the 18th of December I received on account of the Pioche estate fifty dollars in payment of rent to the 1st of January, and it also shows that I received one hundred and twenty-five dollars in

240 full for the month of January, 1874.

Cross-examination by Mr. BROOKS:

Q. 1. Do you know where Mr. Felton's office was prior to that?

A. No, sir; not of my own knowledge; I don't. I had always presumed that it was with the Pioche estate. I could not state that, sir, as a fact, although it was always understood that he was the attorney for them.

241 Examination-in-chief of JAMES M. TAYLOR (a witness on behalf of complainant in rebuttal) by Mr. WISE:

Q. 1. Mr. Taylor, what is your business?

A. I am an attorney and counsellor at law.

Q. 2. Did you know John B. Felton in his life?

A. Yes, sir.

Q. 3. What connection had you with Mr. Felton during the latter part of his life?

A. Well, no special connection; not immediately before his death; indeed, I never did have any direct connection with him, except that he was an executor at one time of the Pioche estate; at least up

to the time of his death he was; and at one time I was employed as the attorney of that estate by him in connection with the other executors. I have been connected with him in a good many cases, special cases, but never had any direct connection with him.

242 Q. 4. Did you and he occupy offices together in the same building?

A. I did at one time—yes; in fact, I have two or three times at different places.

Q. 5. When did Mr. Pioche die?

A. In 1872—May 2nd, 1872.

Q. 6. At the time of Mr. Pioche's death where was Mr. Felton's office?

A. In Court block, 636 Clay street.

Q. 7. After Mr. Pioche's death where did Mr. Felton move his office to?

A. Moved it to the corner of Jackson and Montgomery streets.

Q. 8. Were you with him in that building?

A. Yes; I was employed as the attorney in the estate, and we occupied adjoining offices; that is, we occupied offices that belonged to the estate of Pioche.

Q. 9. Did the office of the estate move from that building to the corner of Clay and Montgomery?

A. Yes.

Q. 10. When the office of the estate moved did you and Mr. Felton move with it?

A. Yes.

243 Q. 11. At what time did you and he and the office of the estate move from the corner of Jackson and Montgomery streets to the corner of Clay and Montgomery?

A. About the first of January, 1874.

Q. 12. How long had Mr. Felton been occupying the office at the corner of Jackson and Montgomery streets; was it for more than a year prior to his moving?

A. Yes; Mr. Felton went down there soon after Pioche's death, down to Jackson street, corner of Jackson and Montgomery, probably within three months; at any rate, after that; probably a little sooner than that; probably within a month or two; and he continued there until about the first of January, 1874.

Q. 13. And did he continue to have his office in that office in that building up to the time of his death, at the corner of Clay and Montgomery streets?

A. Yes; continued there at the corner of Clay and Montgomery. I did not continue mine there.

Q. 14. He continued to have his there?

A. Yes, sir.

244 Q. 15. Have you any memoranda by which you know this is correct, outside of your memory?

A. Well, as to the time we moved—I had my office in Court block prior to Pioche's death, not with Mr. Felton, but he had his on the second floor from the street and I had mine on the third floor from the street; at the time we were in no way connected except some-

times in special cases; our offices had no connection whatever. When I was employed by the Pioche estate I moved from Court block down to Montgomery street and took what furniture I had in my office down there. They had pretty extended offices down there—rooms. When we moved from Jackson street into the new offices, corner of Clay, the room was more contracted and I sent some of my furniture to auction to be sold, and it was badly sacrificed. I have a memoranda of when I got the pay for that furniture from the auctioneer. (Refers to pocket memorandum book.) I
245 received pay from him on the 3d.

Q. 16. 3d of what?

A. Of January, 1874.

Q. 17. And how long before that had the furniture been sent to the auctioneer?

A. I undoubtedly sent it directly from the other office, probably the last of December, as we were moving out. My strong impression—strong recollection outside of memoranda—is that our lease commenced on the 1st of January, 1874, at the corner of Clay and Montgomery streets.

(Continued until Wednesday, April 13th, at 11 o'clock a. m.)

246 WEDNESDAY, *April* 13, 1881.

Present: Mr. Wise, solicitor for complainant; Mr. Brooks, solicitor for respondent.

Examination-in-chief of JAMES L. CRITTENDEN (a witness on behalf of complainant in rebuttal) by Mr. WISE:

Q. 1. Mr. Crittenden, are you an attorney and counsellor at law?

A. I am.

Q. 2. Over twenty-one years of age?

A. Yes, sir.

Q. 3. Do you know Theodore Le Roy?

A. I do.

Q. 4. Do you know something about the claim in this case that Mr. Newhall is suing, which is a claim of Wilson, Crittenden, Felton, and Patterson against Theodore Le Roy for some money?

A. Yes; I do.

Q. 5. When did you first become acquainted with the existence of that claim; about what year?

A. About the year 1871, I think.

247 Q. 6. Did you ever have any interviews with Le Roy about it?

A. I did; several.

Q. 7. At what time?

A. I think my first interview with Mr. Le Roy was subsequent to 1874, or about that year; it may have been a little later.

Q. 8. Do you remember the year that you moved to the office that you now occupy?

A. I do.

Q. 9. What year was that?

A. That was in the fall of 1875, after the election of that year, I

think.

Q. 10. Did you have any interview with Theodore Le Roy after you moved to your present office—that is, after the fall of 1875?

A. I did; several.

Q. 11. Will you state the substance of the conversation between you and Mr. Le Roy about that claim?

Obj. Mr. BROOKS: I object to his stating the substance of the interviews. I claim that he should state what occurred at each, and take one at a time.

Q. 12. Mr. WISE: State when was the first time you saw
248 Mr. Le Roy after 1875, after you moved into that office, the first time you saw him and had any conversation with him, and what that conversation was.

A. It is not possible for me, after a long lapse of time since those interviews occurred, to fix at this time the order in which those interviews occurred or the precise language of the conversation at any one interview. I remember having several interviews with Mr. Le Roy, and also with Mr. J. B. Felton, in regard to the claim of Mrs. Crittenden, which had been assigned to her by Mr. Samuel M. Wilson, the successor of Wilson & Crittenden. That claim, the assignment, was in my possession, being placed in my charge by Mrs. Crittenden to see what I could do in regard to collecting any money due on account of that claim. The only interviews I had with Mr. Le Roy were interviews in relation to this claim, and I acted in that matter as the attorney and legal adviser of Mrs. Crittenden. I called on Mr. Le Roy or wrote to him requesting some statement in
249 regard to this claim, and then called at his office in the building on the corner of Jackson and Montgomery streets—the southwest corner building. It was for the purpose of ascertaining from Mr. Le Roy what grounds he had for not paying the claim and what rights Mrs. Crittenden had, and to ascertain the exact nature and character of her claim by the inspection of any papers in the possession of Mr. Le Roy. This interview took place, to the best of my recollection, about ten o'clock in the morning. I understood, either from the correspondence with Mr. Le Roy or from an interview with him or Mr. Felton in relation to the matter, that Mr. Le Roy claimed that this claim of Mrs. Crittenden and the claim of Patterson and Felton, I think, were not to be paid until subsequent to the payment and satisfaction of certain sums of money which he claimed was due to him, Le Roy. With a view of ascertaining upon what ground
250 Mr. Le Roy based his claim, I had this interview at his office. After I had arrived there at this, I think, previous appointment, for the purpose of examining these papers, Mr. Le Roy produced this deed, the trust deed. I asked him for the papers showing Mrs. Crittenden's claim and the claim of Mr. Le Roy in the matter. I took this deed, examined it, and was surprised to find that it contained no provision or clause in substance such as I understood from Mr. Le Roy he claimed as the arrangement, and I asked him if that was the paper which provided in regard to the claim of Mrs. Crittenden. I asked him why that was not stated in

that paper as a distinct claim, and he said that the amount of the claim and of the claims of the attorneys was included in the four hundred and forty-six and some odd thousand dollars, if I remember right, mentioned in the deed. I then asked if there was anything else that he had showing the matter. He said it was
251 all contained in that deed. I expressed my surprise, as I understood from that deed it would be all on the same footing if that amount was included in the four hundred and forty-six thousand dollars. I asked for any other papers that they had in relation to the matter, and they had some statements of accounts, some of which either Mr. Le Roy or Mr. Steinbach produced. I glanced at them; said that I probably wanted an opportunity at some future time to examine into those accounts. I think that is substantially what occurred at that interview.

Q. 13. You did, then, ask for any paper showing that Mr. Le Roy was to be paid first, and he stated it was all in the deed?

A. I have no doubt, in regard to that point, at all, because this was my first examination of this instrument, and I was surprised, first, that there was no mention of these distinct claims in the deeds—that is, the claim of these attorneys; I recollect that dis-
252 tinctly; and, secondly, that there was no mention of any priority, such as Mr. Le Roy claimed to have in the matter, and I recollect that I distinctly asked him if he had anything showing anything of that kind, and he said it was all contained in the deed. I now recall something else that was said in that connection. Then he said—now, I will not be positive as to whether this was at that interview; it was either at this interview or within a short time afterwards—that Mr. Felton had arranged the whole matter, and that Mr. Felton told him that was the arrangement about his priority, but that he had not seen Mr. Crittenden or Mr. Patterson or these attorneys in relation to the matter, and that Mr. Felton attended to the whole business. Now, if I recollect right, I asked him in that connection about the deed, as to whether the statement was made to him prior to the execution of the deed. My recollection is
253 that he said that Mr. Felton reported to him when he gave him the deed, something of that kind I was particular to inquire in regard to whether he had any evidences of his agreement signed by these parties, and he then said to me, either at that interview or at the next one, when this conversation which I have just stated occurred, that he had no paper signed by any of these parties. All he knew was from the verbal statements of Mr. Felton, and that the whole thing was contained in the deed.

Q. 14. Did he show you this paper? (Handing witness Respondent's Exhibit 14.)

A. I never saw this paper before; I never heard of the existence of any such paper, unless within the last twelve months. This paper is a paper which Mrs. Felton mentioned to me as a paper shown to her by Mr. Le Roy or Mr. Steinbach, or both, and asked me if I had ever heard about the paper or any such paper. I understood
254 from her then that she had some papers in Felton's handwriting at the time she spoke to me. This may be the paper to which she referred.

Q. 15. After your interview with Mr. Le Roy, and seeing the trust deed, did you have an interview with Mr. Felton?

A. I think I had, at Mr. Felton's office, at the southeast corner of Clay and Montgomery, in this city.

Q. 16. Did you tell Mr. Felton?

A. I understood that Mr. Felton was then Mr. Le Roy's attorney in this and other business.

Q. 17. Did you tell Mr. Felton that you had seen that trust-deed and speak to him about the matter?

A. I told him I had seen the deed, and asked him about the entire matter; told him my opinion about it, and wanted to know whether he would join with Mrs. Crittenden and Mr. Patterson, or whether his position as attorney for Le Roy would interfere
255 with it. He gave me to understand that he had been paid a large portion of his claim by Mr. Le Roy——

Mr. BROOKS: I object to all this.

The WITNESS (continuing): I asked him how much Le Roy had paid him on account of that claim under that deed, and he declined to say how much. In this conversation also I wanted to know from him whether there was any arrangement in writing—anything beyond what was contained in that deed, and he said there was not. He said that he had a verbal understanding with Le Roy in regard to the matter personally. I immediately saw Patterson and Nugent and told them what Mr. Felton had stated to me in regard to his having been paid a portion, or a large portion, of his claim by Le Roy.

Q. 18. The Mr. Crittenden who was a partner of Mr. Wilson in the firm of Wilson & Crittenden was your father, I believe?

A. He was.

Q. 19. Will you state the date of his death, as near as you can?

256 A. I think November 7th, 1870. I was not here at that time; I was on my way here from New York. I left New York, my recollection is, on the 5th; he died two days afterwards, I think. I may be mistaken as to 1870 or 1871 as to the exact date of his death. Whether it was 1870 or 1871 I wouldn't be positive.

Q. 20. 1870 or 1871, you say?

A. It was one of those years.

Q. 21. Was the conversation you have spoken of the only one you had with Mr. Felton about this matter?

A. I don't think that was the only interview I had with Mr. Felton; I think I had several interviews with Mr. Felton. In all of them I tried to get any information I could in relation to this matter and to see if I could not secure some payment on account.

Cross-examination of JAMES L. CRITTENDEN, by Mr. BROOKS:

257 Q. 1. I show you a letter dated San Francisco, December 26th, 1876, addressed to Theodore Le Roy, and purporting to be signed by James L. Crittenden. Is that letter in your handwriting?

A. No, sir; that is my signature, James L. Crittenden, at the end of it.

Ex. 22. (The letter above referred to is put in evidence by respondent and marked "Respondent's Exhibit 22.")

Q. 2. You sent that note, did you?

A. Yes, sir; I either sent it by mail or sent it by some person. I probably sent it.

Q. 3. Did you receive a reply to that?

A. I did.

Q. 4. Where is that?

A. No, I don't think I did; I don't think I did receive a reply to that. I am not certain about that. I think [I] had an interview in relation to that one. I think there was an interview in regard to that with Mr. Steinbach or Mr. Le Roy, and subsequently I wrote him another letter; that is my impression.

Q. 5. I now show you a letter dated San Francisco, May
258 16th, 1877, addressed to Theodore Le Roy and purporting to be signed by James L. Crittenden. Is that your signature?

A. That is my signature. That is, I think, in the handwriting of Mr. Moses; written probably under my dictation.

Ex. 23. (The letter last above referred to is put in evidence by respondent and marked "Respondent's Exhibit 23.")

Q. 6. Did you receive a reply to that?

A. Well, I don't know. I received some letters from Mr. Le Roy, but whether in reply to that or not I don't know.

Q. 7. See if you received a reply of which this a copy. (Handing witness paper.)

A. I think I have a recollection that I had such a letter, and I think I gave that letter, the original, to Mr. Wise. It may be a copy; I am not positive.

Mr. BROOKS: Mr. Wise, will you produce it?

Obj. Mr. WISE: We object to all these as incompetent and irrelevant. I have two or three letters which I have no objection to produce. I cannot produce them now. I object to this, also, as not being cross-examination.

259 The WITNESS: I think that is substantially what was received from Mr. Le Roy. I think it led to an interview; that is my impression. If I had the letter I would produce it. I have given the letter to Mr. Wise. He asked me what I knew about the matter. I have no interest whatever in this suit.

Q. 8. Mr. BROOKS: The original you gave to Mr. Wise, eh?

A. Yes, sir.

Mr. BROOKS: I wish to have it noted that we call upon Mr. Wise to produce the original of the letter which Mr. Crittenden has stated he received from Mr. Le Roy or Mr. Steinbach.

Mr. WISE: I answer that I will do so, but I haven't them with me now.

Q. 9. Mr. BROOKS: I show you a letter dated San Francisco, June 14th, 1877, addressed to Theodore Le Roy and purporting to be signed by James L. Crittenden. Is that your signature?

A. That is my signature.

Odj. (Objected to by complainant as incompetent and irrelevant.)

Q. 10. This is a copy of an assignment seat at the same time?

260 A. My impression is that I delivered that the morning I had the interview, but I may be mistaken about it; I must have taken the original that morning at that interview.

Ex. 24. (Respondent puts in evidence the letter last above referred to, marked "Respondent's Exhibit 24.")

Q. 11. I show you a letter dated San Francisco, May 18, 1877, addressed to James L. Crittenden, and purporting to be signed by Theodore Le Roy. Did you receive that letter?

A. I think I received a letter substantially like that.

Ex. 25. (The letter last above referred to is put in evidence by respondent and marked "Respondent's Exhibit 25.")

Q. 12. I show you a letter dated San Francisco, November 19, 1879, addressed to Theodore Le Roy and purporting to be signed by James L. Crittenden. Is that letter in your handwriting?

A. That is my signature and my handwriting.

Q. 13. What is the date of that?

A. November 19th, 1879.

261 Ex. 26. (The letter last above referred to is put in evidence by respondent and marked "Respondent's Exhibit 26.")

Q. 14. I show you a letter dated San Francisco, November 28th, 1879, addressed to Theodore Le Roy and purporting to be signed by James L. Crittenden. Is that letter in your handwriting?

A. That is my handwriting and my signature.

Q. 27. (The letter last above referred to is put in evidence by the respondent and marked "Respondent's Exhibit 27.")

Q. 15. I now show you a copy of a letter dated San Francisco, June 16, 1877, addressed to James L. Crittenden and purporting to be signed by Theodore Le Roy. Did you receive that letter?

A. I am not certain now about ever receiving that; it is possible I may not have received the letter; I don't recollect it; it may be; it is very possible I received it.

Ex. 28. (The letter last above referred to is put in evidence by respondent and marked "Respondent's Exhibit 28.")

Obj. (Objected to by complainant as incompetent and irrelevant.)

262 Mr. WISE: I only received two letters from Mr. Le Roy, both of which I will produce.

Q. 16. Mr. BROOKS: Mr. Crittenden, when was it that you asked Mr. Le Roy if he had any paper signed by any of the parties?

A. That was, to the best of my recollection, at the interview in relation to this deed, when I inspected this deed.

Q. 17. I show you a copy of a letter, dated San Francisco, November 29th, 1879, addressed to James L. Crittenden and purporting to be signed by Theodore Le Roy. Did you receive that letter?

A. I have some recollection of seeing a letter like that.

Ex. 29. (The letter last above referred to is put in evidence by respondent and marked "Respondent's Exhibit 29.")

Q. 18. Was it with Mr. Le Roy himself you had the interview to which you have last referred?

A. Mr. Le Roy and Mr. Steinbach were both at the office. Part of the conversation I had with Mr. Steinbach and part with Mr. Le Roy. I think the part with Mr. Steinbach related to the accounts.

263 Q. 19. In what language was your conversation with Mr. Le Roy?

A. In English.

Q. 20. Mr. Le Roy is a Frenchman, is he not?

A. I don't know. I should suppose so from his conversation. He understands English very well. I have had quite a number of conversations with Mr. Le Roy without difficulty in understanding him, or in his understanding me.

Q. 21. You think he understood you?

A. At that time?

Q. 22. Yes.

A. I don't think there is any doubt about it.

Q. 23. You think he understood you to ask him for a paper signed by any of the parties evidencing the terms of that trust?

A. Yes, sir; because I particularly called attention to the matter, and wanted to know how it arose and how it was evidenced; went there for that purpose. I examined the deed, and asked him the questions, and he stated that it was included in that four hundred and forty-six thousand dollars, or something total. I wanted to

264 know if there was any other paper relating to the matter; went there for that express purpose.

Q. 24. You are sure that you asked him for a paper signed by the parties, or either of them?

A. Any paper relating to the claim.

Q. 25. You don't answer my question, Mr. Crittenden.

A. Well, I will endeavor to do so. I am able to state that I asked Mr. Le Roy for the deed, examined the deed, asked him then how the claim arose of these parties, and how it was provided for, as I did not see it mentioned in the deed, and he said it was included in the four hundred and forty-six thousand dollars, and I asked him if there were any other papers relating to that claim, and he said there were none. Then I had some conversation with him in regard to whether he claimed to be paid first, and he said that he had had no personal interview with A. P. Crittenden or William H. Patterson, but that Mr. Felton attended to the whole bus-

265 iness, and that Mr. Felton told him that he had a right to be paid first. I would state that I am not attorney, and have no interest whatever in this suit, either directly or indirectly. I

supposed I would be an attorney in this case, but was turned out of the case.

266 MONDAY, *April* 25, 1881.

Present: Mr. Wise, solicitor for complainant; Mr. Brooks, solicitor for respondent.

Re-examination of J. B. MHOON (a witness on behalf of respondent in rebuttal) by Mr. BROOKS:

Q. 1. Mr. Mhoon, you were the referee in the case of Le Roy against Estudillo?

A. Yes, sir.

Q. 2. You remember that Mr. Le Roy was called to testify in that case and that Mr. Sharp examined him concerning the forty-nine thousand dollars.

A. I recollect that he was called as a witness and was examined acout that matter.

Q. 3. Do you remember Mr. James L. Crittenden coming there?

A. Yes, sir; Mr. Crittenden also appeared in the case.

Q. 4. How soon after that examination of Mr. Le Roy did

267 Mr. Crittenden come there?

A. Well, it would be impossible for me to tell at this time how soon after, but the fact that he did come and investigated that question of the forty-nine thousand dollars and Mr. Le Roy's testimony as to the forty-nine thousand dollars is true.

Q. 5. How did he investigate it?

A. He took the testimony and examined it and then presented a brief on the question as to whether that forty-nine thousand dollars should be allowed as an item in Mr. Le Roy's account.

Q. 6. Do you remember on the occasion when he first came there he examined the trust deed and other papers filed before you?

A. I can't say whether he did so on the first occasion upon which appeared before me or whether it was on a subsequent occasion, but I am satisfied that he did examine those papers in that case; but, Mr. Brooks, it is impossible to say upon which particular time he made these examinations.

268 Q. 7. You remember, Mr. Mhoon, that he did not appear there originally in the first place.

A. Yes, sir; I remember that.

Q. 8. Do you know whether or not Mr. Crittenden appeared there immediately after the testimony of Mr. Le Roy in consequence of a notice which I sent to him informing him of the fact of the ground that Mr. Sharp was taking—the position that he was taking?

A. I do not know that.

Obj. (Objected to by complainant as incompetent and irrelevant.)

Q. 9. Mr. WISE: You say you don't know?

A. I do not know the fact. I do not know that that was the occasion of his appearing.

Q. 10. Mr. BROOKS: Do you remember whether the first time he came there he came with any one or alone?

A. My impression is that he came at recess and asked for the testimony and papers, and looked over them alone.

Q. 11. You don't remember whether he at that time told you what occasioned him to come?

A. No; I do not; nor do I think that he told me what oc-
269 casioned him to come.

Q. 12. When he read the testimony of Mr. Le Roy touching the forty-nine thousand dollars, did he, in connection with that, say anything to you; did he refer to the provision in the trust deed?

A. Well, Mr. Crittenden made quite an argument before me on that subject, and, while I can't now recollect the various points of his argument, I am quite certain that he did refer to that, because it was material.

Q. 13. What I want to get at is the date that he came there and examined those papers.

A. Well, now, Mr. Brooks, it is just possible I still have preserved all the memoranda in connection with this case, and it is just possible that I might be able to fix the date exactly.

Q. 14. I suppose you could fix the date at which Mr. Le Roy gave his testimony on that subject?

A. Yes; the record ought to show that.

270 Cross-examination of J. B. MHOON by Mr. WISE:

Q. 1. Mr. Mhoon, you say that Mr. Crittenden appeared in the case. He never had any control or direction or management of that case?

A. No, sir; I mean by appearing that he made an argument before me and presented a brief on that question of the forty-nine thousand dollars.

Q. 2. That argument was to show that the forty-nine thousand dollars ought not to go into that arrangement, was it not?

A. Why no; it was an argument to show that it ought to go in.

Q. 3. Do you know whether Mr. Crittenden attempted to get into the case, so as to control any part of that forty-nine thousand dollars?

A. My impression is that he made an application to intervene.

Q. 4. And that was denied?

A. And that was denied; that is my impression.

271 (It is admitted that James L. Crittenden applied to the court for leave to intervene on behalf of Mrs. Crittenden, and that the same was denied, and that a bill of exceptions was filed, and no further steps taken, and also that Mr. Le Roy's counsel opposed that intervention.)

Re-examination of THEODORE LE ROY (on behalf of respondent on rebuttal) by Mr. BROOKS (Rudolph Steinbach acting as interpreter):

Q. 1. Do you know James L. Crittenden?

A. I do.

Obj. Mr. WISE: We object to any evidence being given in this case. You have no right to introduce evidence.

Mr. BROOKS: When did you become acquainted with him?

A. He came to my office after I had written some letters to him; otherwise I do not consider that I am acquainted with him.

272 Q. 2. Did you have any interview with him prior to the commencement of the reference in the case of Le Roy against Estudillo?

A. I think not.

Q. 3. Was any answer made to Exhibit 22?

A. No; no answer made in writing.

Q. 4. Did you have any interview with him before the receipt of Exhibit 23?

A. I think not.

Q. 5. Do you remember when Mr. Felton died?

A. I think it was in 1877; but I am not sure whether it was in March or in May.

Q. 6. Do you remember whether Mr. Felton died before the reference in the case of Le Roy against Estudillo?

A. I think he did die before that.

Q. 7. Did I have anything to do with that suit before Mr. Felton died?

A. No.

(It is admitted that John B. Felton died in May, 1877.)

Q. 8. After you had dispatched your letter of May 18th, in which you informed Mr. Crittenden of the terms upon which you

273 held that property, did you have any interview with Mr. Crittenden before the receipt of his letter of June 14th, in which he acknowledges the receipt of your letter of May 18th?

A. He came after receiving this letter of the 18th of May and asked for the deed of trust.

Q. 9. Had you any interview with Mr. Crittenden prior to the death of John B. Felton?

A. I do not think I had.

Q. 10. Mr. Crittenden states in his testimony that at the time of his first call upon you he understood either from the correspondence with you or from an interview with you or Mr. Felton in relation to the matter that you claimed that this claim of Mrs. Crittenden and the claim of Patterson and Felton were not to be paid until subsequent to the payment and satisfaction of certain sums of money which you claimed was due to you. Had you communicated that fact to him in any other way than by this letter of May, 1877?

A. It was never communicated to him personally by my-

274 self; the only conversation I had with Mr. Crittenden was when he called there, and I told him then that Mr. Steinbach had entire charge of the Estudillo matters, and he called there after this letter of May 18th, 1877, and I told him that he would have to see Mr. Steinbach, and he explained to him all that there was about it.

Q. 11. And was that later than this letter of June 14th?

A. I believe it was after May 18th; it must have been after the 14th of June.

Q. 12. After the letter of the 14th of June?

A. After the letter of the 14th of June.

Q. 13. Look at the letter of June 16th and see if the interview was subsequent to the date of that letter.

A. I think it was subsequent to that.

Q. 14. Was there any other written communication between you in the interval between that date, June 16th, 1877, and November 28th, 1879?

A. I believe not.

Q. 15. Was the first interview between Mr. Crittenden and yourself by appointment?

275 A. No.

Q. 16. Did he inform you at that time that he desired to ascertain upon what ground you based your claim?

A. Never with myself. The first interview I had with him I told him that Mr. Steinbach had charge of all that business, and that I did not understand English enough to talk upon such a subject. I referred him to Mr. Steinbach.

Q. 17. Did you produce the trust deed?

A. Mr. Steinbach gave him the trust deed.

Q. 18. Did Mr. Crittenden at that or any subsequent interview ask you for the papers showing Mrs. Crittenden's claim and the claim of Mr. Le Roy in the matter?

A. Never.

Q. 19. Did Mr. Crittenden express on that or any occasion surprise that the trust deed contained no provision or clause in substance as he had understood from you you claimed as the arrangement?

A. Never with myself.

276 Q. 20. Did he ever to any one in your presence?

A. I think not, because I didn't follow the conversation or didn't try to follow the conversation that Mr. Crittenden had with Mr. Steinbach upon the subject.

Q. 21. Did Mr. Crittenden on that or any occasion ask you if that was the paper which provided in regard to the claim of Mr. Crittenden?

A. No.

Q. 22. Did he on that or any occasion ask you why that was not stated in that paper as a distinct claim?

A. No, never.

Q. 23. Did you tell him on that or any occasion that the amount of that claim and of the claims of the attorneys was included in the four hundred and forty-six and some odd thousand dollars mentioned in the deed?

A. I never did.

Q. 24. Did he on that or any occasion ask you if there was anything else that you had showing the matter?

A. No.

277 Q. 25. Did you say to him that it was all contained in that deed, and did he express his surprise?

A. Never. I never spoke to Mr. Crittenden afterwards.

Q. 26. Did he on that or any other occasion state to you that he understood from the deed that it would be all on the same footing if that amount was included in the four hundred and forty-six thousand dollars?

A. Never. I never spoke to Mr. Crittenden, except on the occasion when he first called there, which I have mentioned.

Obj. Mr. WISE: I object to all this as leading and as incompetent and irrelevant.

Q. 27. Mr. BROOKS: Did he ask you for any other papers that you had in relation to the matter?

A. Never. Mr. Crittenden never asked me, except for the deed of trust.

Q. 28. Did he ask you on that or any occasion if you had anything showing anything of that kind, and did you say it was all contained in the deed?

Obj. (The same objection by complainant.)

A. No, sir.

278 Q. 29. Did you tell him that Mr. Felton had arranged the whole matter, and that Mr. Felton told you that that was the arrangement about his priority?

A. No.

Q. 30. Did he ask you, in that connection, about the deed, as to whether the statement was made to you prior to the execution of the deed?

A. No, sir.

Q. 31. Did you say to him that Mr. Felton reported to you when he gave you the deed—something of that kind?

A. No, sir.

Q. 32. Did he inquire of you in regard to whether you had any reference *of* the agreement signed by these parties?

Obj. (The same objection by complainant.)

A. Never.

Q. 33. Did you say to him that you had no paper signed by any of these parties?

Obj. (The same objection by complainant.)

A. Never.

Q. 34. Did you say to him that all you knew was from the verbal statements of Mr. Felton, and that the whole thing was contained in the deed?

279 Obj. (The same objection by complainant.)

A. No, sir.

Q. 35. Did Mr. Crittenden at any time tell you that Mr. Felton had stated to him that he had been paid a large portion of his claim by you?

Obj. (The same objection by complainant.)

A. No.

Q. 36. Do you understand English very well?

A. I understand some English, but not enough to talk on business; particularly on a matter like this.

Q. 37. How many conversations did you have with Crittenden altogether?

A. I don't remember any other conversation, except the one when I told him that Mr. Steinbach had charge of all this Estudillo business. It is possible that he called several times, and I always told him that Mr. Steinbach was not there; that he would have to see him.

Q. 38. Could you communicate your ideas to him in English without difficulty?

A. It is possible, but I might interpret words in the wrong way.

280 Q. 39. Could you understand him while conversing in English without difficulty?

A. I wouldn't say that.

Q. 40. Did Mr. Crittenden, at any time, ask you how the claim of those parties arose and how it was provided for?

Obj. (The same objection by complainant.)

A. Never.

Q. 41. Did he at any time ask you if there were any other papers relating to that claim?

A. No.

Q. 42. Did you ever tell him that there were no other papers?

A. Never.

Q. 43. Did you ever tell him that Mr. Felton told you that you had a right to be paid first?

A. No.

Recross-examination of THEODORE LE ROY by Mr. WISE:

Q. 1. Mr. Le Roy, can you fix the date that Mr. Crittenden called to see you?

A. I think it was in consequence of the answer I made to his letter.

281 Q. 2. Can you fix the date outside of that circumstance that you mention?

A. No; I think not.

Q. 3. Since Mr. Crittenden testified in this case have you talked with anybody about this?

A. I don't think that I ever talked with anybody about it.

Q. 4. Has Mr. Crittenden's evidence been read to you?

A. This morning the testimony of Mr. Crittenden was read to me.

Q. 5. Who read it to you?

A. Mr. Steinbach; it was translated to me by Mr. Steinbach.

Q. 6. Did Mr. Steinbach and yourself talk about the truth or inaccuracy of that testimony?

A. No; I only heard what was his testimony from Mr. Steinbach.

Q. 7. Did you make any statement to Mr. Steinbach that Mr. Crittenden was right or wrong?

A. In hearing the translation I said several times that it was not true.

Q. 8. Prior to his translating it to you this morning was
282 any statement made to you that you would have to testify here?

A. No.

Q. 9. Did you, prior to this morning, know that your testimony would have to be taken here?

A. The last time that it was postponed I was given to understand that my testimony would be required.

Q. 10. Who gave you to understand that?

A. Mr. Steinbach.

Q. 11. Did Mr. Steinbach give you to understand that prior to knowing what Mr. Crittenden's testimony was?

A. No; Mr. Steinbach told me that I should be called in court to testify.

Q. 12. Did you give Mr. Felton any money prior to his death that is charged on your books, or any money at all?

A. Certainly.

Q. 13. Did you present any claim to Mr. Felton's estate?

A. I gave my account to Mr. Barriolet, who is the executor of Felton's estate.

Q. 14. Did you present a claim to the estate in accordance with law?

A. I presented my account to Mr. Barriolet, telling him at
283 the same time that I should not present the claim in court.

Q. 15. Was that claim allowed or rejected?

A. I don't know anything about it. In handing the claim to Mr. Barriolet I consider that I said to him that, as Mrs. Felton's fortune was small, that her circumstances were not good, that I shouldn't present any claim against her.

Q. 16. Do you know whether Mr. Crittenden had any interview with Mr. Felton about this deed of trust during his life?

A. I don't.

Q. 17. Are you sure that Mr. Crittenden never told you that he had had an interview with Mr. Felton during his life?

A. No; never. I am sure that he never told me anything of the kind.

Redirect examination of THEODORE LE ROY by Mr. BROOKS:

284 Q. 1. Did Mr. Felton ever tell you that Crittendon had spoken to him about it?

A. I don't remember anything.

Q. 2. What was the amount of the account you presented to the executor?

A. It was over thirty-six thousand dollars.

Q. 3. Mr. Le Roy, is this your letter-book (showing witness letter-press copy-book)?

A. Yes, sir.

Q. 4. Was the writing on page 233 placed there in the regular course of business and at or about this date?

A. It was.

285 Re-examination of RUDOLPH STEINBACH (on behalf of respondent in rebuttal) by Mr. BROOKS:

Q. 1. I will ask you, Mr. Steinbach, if the letter-press copy-book which is produced here is the letter-press copy-book of Mr. Le Roy?

A. It is. It is the letter book which was used by him from April, 1870, until October, 1875.

Q. 2. Who made the copies in it?

A. The copies of the letters which I had written I made. The copies of the letters which Mr. Le Roy himself had written in French he made.

Q. 3. Was the copy of the letter on page 233 taken in its regular course and at or about the date it bears?

A. It was taken upon that same date which it bears.

Q. 4. Who took the copy?

A. I took the copy.

Q. 5. Was that signed in the book or is that a press copy of the signature?

286 A. I think it is a press copy of the signature. It certainly is the press copy—the signature is a part of the press copy.

Q. 6. What are the dates of the letter-preceding and following it?

A. The date of the letter preceding it was the 20th of September, 1871, and the date of the letter following it was the 18th of October, 1871.

Q. 7. Is that a press copy of the letter which was sent to Felton, Wilson, and Patterson?

A. It is a press copy of the letter which I myself delivered to Mr. Felton for himself, Wilson, and Patterson.

Q. 8. You and Mr. Le Roy write at different desks?

A. Yes; we do.

Q. 9. You generally write sitting down and he standing up, do you not?

A. So it is.

Q. 10. You use different ink?

A. Each one uses his own ink.

By consent of counsel it is agreed that the letter-press copy-
287 book referred to may be produced at the argument.

Q. 11. Mr. Steinbach, do you remember whether or not Mr. Crittenden was at the office of Mr. Le Roy at any time before Mr. Felton's death?

A. I don't remember that he ever was.

Q. 12. Was he ever there before the writing of that letter?

A. He was never there before the writing of Mr. Le Roy's letter to Mr. Crittenden of the 16th of May, 1877.

Q. 13. Do you remember whether he was ever there before Mr. Le Roy gave his testimony in the referee's case?

A. I have an impression that he was there before, but I am not

certain about that. I don't remember now when Mr. Le Roy gave that testimony, and I can't fix the date.

Q. 14. When he came there to see Mr. Le Roy were you present?

A. I was.

Q. 15. Can you state what took place at that interview?

288 State first whether the interview was with you or Mr. Le Roy.

A. I had had several interviews with him in his own office, and occasionally on the street, before he ever called at Mr. Le Roy's office, and when he did call at Mr. Le Roy's office he asked to see the deed of trust, and I took it out of the papers and handed it to him.

Q. 16. Had he not seen the deed of trust before?

A. No, sir.

Q. 17. Nor a copy of it?

A. Not that I know of.

Q. 18. A copy was annexed to the complaint in the Estudillo case, was it not?

A. It was.

Q. 19. Do you know when that was filed?

A. 1874.

Q. 20. That was filed in 1874, was it?

A. It was filed in 1874—I think in September, 1874.

Q. 21. In any of your interviews did he refer to that suit?

A. Yes, sir; he referred to it, and he asked me to give him an explanation about the state of the account, which I did.

289 Q. 22. Were not the accounts filed in that case accounts annexed to the complaint and to the replication?

A. They were filed in 1874, and from time to time further accounts were filed before the reference.

Q. 23. Did he say whether or not he had examined those papers on file?

A. I don't remember that he said that; he asked me particularly as to the property in hand at the time of Mr. Le Roy, and the chances of being paid.

Q. 24. Did he have any conversation with Mr. Le Roy at that time?

A. No; Mr. Le Roy was very careful to avoid having any conversation with him, and, in fact, it was understood between Mr. Le Roy and me that he should be very careful when Mr. Crittenden should call upon him in speaking with him, because he might easily commit himself, not understanding English well enough to speak with him about the subject.

290 Q. 25. What took place at that interview?

A. Mr. Crittenden, after requesting to have the deed shown to him, read it, but I don't remember now the conversation at that particular time that I had with him, because I had a number of conversations with Mr. Crittenden on this subject, and what took place at that particular occasion I haven't fixed in my mind.

Q. 26. You say he asked for the trust deed?

A. Yes.

Q. 27. And you delivered it to him?

A. Yes, sir.

Q. 28. Did he, upon the production of the trust deed, ask Mr. Le Roy or yourself for the papers showing Mrs. Crittenden's claim and the claim of Mr. Le Roy in the matter?

A. No, sir; he neither asked me nor Mr. Le Roy.

Q. 29. Did he express any surprise at the contents or the omissions of the trust deed?

A. I think he expressed some surprise that the trust deed
291 should not have been more specific in reference to the forty-nine thousand dollars—that it had not mentioned them specifically.

Q. 30. Did he not know that before?

A. I think he knew it from conversations he had with me in which I had spoken on the subject, and, if I recollect right, he came to the office principally to ascertain for himself what all the conditions of the trust deed were. I wish to modify my answer to Q. 29 by stating that Mr. Crittenden did not express surprise, but he made some remarks on the subject, and said it was strange that the forty-nine thousand dollars should not have been specially mentioned in the deed of trust.

Q. 31. Did he ask you if that was the paper which provided in regard to the claim of Mrs. Crittenden?

A. I am not aware of any such question.

Q. 32. Did he ask you why that was not stated in that paper as a distinct claim?

292 A. No; he asked me no question on that subject.

Q. 33. Did he of Le Roy—did he of any one?

A. No, he did not ask me any question; but, as I said before, he made some remarks on the subject.

Q. 34. Did he ask if there was anything else that he, Le Roy, had showing the matter?

A. He did not, and I am quite positive in saying so, because I was quite well aware that Mr. Le Roy had that paper signed by Mr. Felton—that letter of 1873 signed by Mr. Felton—and I was questioning in my own mind whether it was wise and proper for me to offer to show him that paper, but I had come to the conclusion no; that as Mrs. Crittenden had in several conversations with me threatened to bring suit against Mr. Le Roy, and set up a claim to be paid *pro rata*, that it would be better that such a paper should be
293 produced in court if he should bring such a suit, and my recollection is very positive that he never asked me for any other paper, because in that connection I should have considered at once whether it was advisible for me to show it to him or not, and the question never arose in regard to it because he had never asked me for anything else.

Q. 35. Did he ask whether Mr. Le Roy or yourself had any evidence of his agreement signed by these parties?

A. He never asked any such question.

Q. 36. Did you or Mr. Le Roy say that he had no papers signed by any of those parties?

A. I know I didn't say so and I never heard Mr. Le Roy say so.

Q. 37. Did Mr. Le Roy or yourself say that all that he knew was from the verbal statements of Mr. Felton, and that it was all contained in the deed?

A. I never said so.

Q. 38. Did Le Roy?

A. I never heard Mr. Le Roy say so.

Q. 39. When Mr. Crittenden first called at the office were you aware that he made a claim antagonistic to the claim of
294 Mr. Le Roy?

A. I was.

Q. 40. Did Mr. Le Roy know that, too?

A. I had many conversations with Mr. Le Roy before that time, and I had informed Mr. Le Roy of what occurred at those conversations.

Q. 41. Were you aware before that call that he set up the claim that under the trust deed that he could claim to take priority over Mr. Le Roy?

A. I was, because he said so to me.

Q. 42. And did he know before that interview that you repudiated that claim?

A. He did.

Q. 43. That your claims were antagonistic?

A. He did, because I fully explained that all to him.

Recross-examination by Mr. WISE:

Q. 1. When you say that the letter-press copy was taken on the same day that the letter was written, do you remember that?
295 A. I remember it for this reason—that I remember distinctly that a letter was delivered to Mr. Felton by myself on the same day, and it was delivered after the press copy was taken; so it must have been taken on the same day.

Q. 2. Do you remember the fact that you took a letter-press copy at all; do you remember the fact outside of the letter-book?

A. Well, copying letters is of such frequent occurrence with me—I copy letters every day, I may say, a good many of them—that the copying of a single letter some seven years ago would not impress itself upon my memory.

Q. 3. So you don't remember except from the book itself?

A. I can't say that I do.

Q. 4. Now, you state positively that Mr. Crittenden never was at Mr. Le Roy's prior to Le Roy's letter to him?

A. Yes, sir.

Q. 5. Can you swear to that?

A. I am quite positive on that subject.

296 Q. 6. Might he not have been there some time when you were not there?

A. Oh! he may have been there, and, finding the door locked, did not go in.

Q. 7. Might he not have been in the office with Mr. Le Roy when you were not there?

A. Oh! of course it is possible, but I remember distinctly that

when he came there the first time that Mr. Le Roy had not had any conversation with him, but, from all that occurred, I concluded that.

Q. 8. From all that occurred you concluded that?

A. Yes, sir.

Q. 9. Now, do you pretend to say that you were present at all the times that Mr. Crittenden had any interviews with Mr. Le Roy?

A. No, sir; I do not pretend to say anything of the kind; but whenever Mr. Crittenden came to see Mr. Le Roy Mr. Le Roy in each case referred him to me and refused to have any conversation with him.

Q. 10. You understood that from Mr. Le Roy?

297 A. I did, and it was in accordance with an understanding I had with Mr. Le Roy before that time that he should avoid having any conversation with Mr. Crittenden.

Q. 11. You say you had had an understanding with Mr. Le Roy that he should avoid having any conversation with Mr. Crittenden?

A. Yes; any explanations with him.

Q. 12. When did you first have that understanding with Mr. Le Roy?

A. From the time of the first conversation I had with Mr. Crittenden myself; I warned Mr. Le Roy.

Q. 13. Where was it you first had a conversation with Mr. Crittenden yourself?

A. I cannot fix the time, but I suppose it was within six months before that letter of May the 16th, 1877, was written, and I remember distinctly having received Mr. Crittenden's letter of December, 1876, addressed to Mr. Le Roy, and that I called on Mr. Crittenden and gave him an explanation of the state of the accounts.

298 Q. 14. Why should you warn Mr. Le Roy to have no conversation with Mr. Crittenden?

A. I did that because Mr. Crittenden had told him, Le Roy, that he thought he would bring a suit against Mr. Le Roy, and I thought it was dangerous for Mr. Le Roy to commit himself in any way to an adverse lawyer.

Q. 15. You say, then, that the first information that Mr. Crittenden had of this thing was about the 18th of May, 1877, but he had been talking to you prior to that about bringing suit?

A. Certainly he had, because he wrote to Mr. Le Roy in December, 1876, and immediately after receiving that letter I called upon him and gave him explanations, and we had frequent conversations together.

Q. 16. In December, 1876, then, you knew that Mr. Crittenden contemplated bringing suit?

A. I did.

Q. 17. Mr. Crittenden had talked to you about it?

A. He had.

Q. 18. You had warned Mr. Le Roy then to have no conversation with him?

A. I had.

299 Q. 19. Was it in consequence of that interview you had with Mr. Crittenden that you advised Mr. Le Roy to have no conversation with him?

A. It was in consequence of that.

Q. 20. How long prior to December, 1876, did you know that Mr. Crittenden intended to bring suit?

A. That I don't know.

Q. 21. Was it some time prior to December, 1876?

A. I don't remember having spoken with Mr. Crittenden before that time.

Q. 22. Now, after you knew that Mr. Crittenden contemplated bringing suit, did you have any interviews with Felton on that subject?

A. I had.

Q. 23. You told him that Mr. Crittenden contemplated bringing suit?

A. I did.

Q. 24. Did he tell you that he had seen Mr. Crittenden himself?

A. I told him, Mr. Felton, that Mr. Crittenden had said to me that he, Mr. Felton, had intimated to him that a part of that money had been paid to him by Mr. Le Roy, and Mr. Felton
300 laughed at it and said: "How absurd that is! You know better yourself," he said to me.

Q. 25. Then you did tell Mr. Felton that Mr. Crittenden had told you that in an interview he had with Mr. Felton he stated to Mr. Felton that part of the money had been paid to him?

A. I did. I have just said so.

Q. 26. About what time was it that you had that conversation with Mr. Felton, as near as you can remember?

A. I cannot remember the date, but it must have been after December, 1876.

Redirect examination of RUDOLPH STEINBACH by Mr. BROOKS:

Q. 1. Was that conversation with Mr. Crittenden before this interview in which you showed the deed?

A. It was.

Q. 2. That was the conversation with Mr. Crittenden in
301 which he intimated to you that Felton said that something had been paid?

A. Yes, it was.

Q. 3. That was before this interview, at the office in which you showed him the trust deed?

A. It was.

Q. 4. At that time he knew that there was nothing expressed in the trust deed in regard to the matter?

A. He must have know- it, but I suppose he wanted to read for himself the original deed.

Ex. 30. Respondent puts in evidence the letter-press copy of the letter hereinabove referred to, being dated San Francisco, 27th Sept., 1871, addressed to Messrs. J. B. Felton, S. M. Wilson, and W. H. Patterson, and signed Le Roy, marked "Respondent's Exhibit 30."

Obj. Objected to by complainant as incompetent, irrelevant, and immaterial.

Obj. Complainant objects to the testimony of the witnesses Le Roy and Steinbach, given this day, on the ground that the same is incompetent, not being proper rebutting evidence.

302 *Certificate.*

I certify that by agreement of counsel the above depositions were taken down in shorthand by S. C. Houghton and by him transcribed into their present form, and that the reading of said depositions to the witnesses and the signing thereof by them respectively were by consent of counsel waived.

And I do further certify that I am not solicitor nor of counsel for any of the parties to this action, nor in any wise interested in the event of this cause.

In testimony whereof I have hereunto set my hand this 26th day April, A. D. 1881.

JOS. F. O'BEIRNE,
Examiner in Chancery.

(Endorsed:) Filed April 26, 1881. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

303 *Bill for Revivor of Cause.*

In the Circuit Court of the United States in and for the Ninth Circuit, District of California.

To the circuit judges of the circuit court of the United States for the district of California:

George D. Newhall, a citizen of California, respectfully states that an action was commenced in the State court, and, on petition, it was transferred to this court, and that afterwards the defendant therein, Theodore Le Roy, appeared and answered and proofs were taken, and the cause was argued and submitted and a decree was rendered on the 20th day of February, 1882, dismissing the bill; that afterwards the said Theodore Le Roy died in the city and county of San Francisco on or about the 8th day of April, 1882, intestate, leaving as his heirs-at-law Victor Le Roy, Eugene Le Roy, and Georges Le Roy, all of whom are citizens of France, and that E. J. Le
304 Breton qualified and is now the administrator upon the estate of Theodore Le Roy, and he qualified in the city and county of San Francisco and is properly appointed as the legal representative; that by the death of said Theodore Le Roy the suit and proceedings have abated and your petitioner is unable to prosecute an appeal from the decree; that your petitioner is advised that he is entitled to have the proceedings revived against the aforesaid heirs-at-law and the aforesaid administrator.

Your petitioner therefore prays that the proceedings may be revived against Victor Le Roy, Eugene Le Roy, Georges Le Roy, and E. J. Le Breton and may not be abated, and that they may be placed in the same plight and state and condition they were at the time of the death of Theodore Le Roy, and that plaintiff may have the

benefit of an appeal, and that the defendants may show cause why the suit and proceedings may not be revived, and that they may be revived.

305 May it please your honors to grant unto your orator the writ of subpœna issuing out of this court and under its seal, to be directed to the aforesaid defendants, directing them to appear in this court and show cause, if they can, why the proceedings should not be revised and be in the same plight and condition they were at the time of the death of Theodore Le Roy, and to further stand and abide such order and decree as to your honors shall seem meet. And your orator will ever pray.

TULLY R. WISE,
Solicitor for Petitioner.

UNITED STATES OF AMERICA, *District of California,* } *ss:*

G. D. Newhall, being duly sworn according to law, deposes and says that he is the petitioner named in the foregoing petition; that he has heard read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the

306 matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

G. D. NEWHALL.

Subscribed and sworn to before me this 20 day of July, A. D. 1882.

L. S. B. SAWYER,
Comm'r U. S. Cir't Court, Dist. Cal.

(Endorsed:) Filed July 20, 1882. L. S. B. Sawyer, clerk.

Answer to Bill of Revivor.

307 Circuit Court of the United States, 9th Circuit, District of California. In Equity.

G. D. NEWHALL *vs.* THEODORE LE ROY.

Victor Le Roy, Eugene Le Roy, and Georges Le Roy, heirs-at-law, and E. J. Le Breton, administrator of the estate of Theodore Le Roy, deceased, saving and reserving to themselves all benefit and advantage that may be had or taken to the bill of revivor of the said plaintiff filed herein for its many errors and insufficiences, for answer thereto or to so much thereof as they are advised is necessary or material for them to make answer, answering say:

They admit the allegations of the said bill of revivor, except as hereinafter denied or alleged.

They aver that said original bill of the said plaintiff was dismissed for want of equity after a full hearing upon the merits and a final decree entered in the lifetime of the said Theodore Le Roy;

308 and they deny that by the death of the said Theodore Le Roy this suit, between the said plaintiff and said Theodore Le Roy, abated, or that the said plaintiff is unable to prosecute an

appeal from the decree, or that the plaintiff is entitled to have the proceedings revived against these respondents; but they admit that the said plaintiff is entitled to the benefit of an appeal, and they hereby enter their appearance herein as the successor in interest of the said Theodore Le Roy, and assent to the making of such entry in this cause as the court may deem necessary, if any, in order to assure to the plaintiff the benefit of his appeal.

B. S. BROOKS,
Sol't. for Respondents.

(Endorsed:) Service by copy admitted this 9th day of December, 1882. Tully R. Wise, sol'r for compl't. Filed Dec. 9th, 1882. L. S. B. Sawyer, clerk, by J F O'Beirne, deputy clerk.

309 *Order That Suit be Continued Against E. J. Le Breton, Adm., &c., et al.*

At a stated term, to wit, the November term, A. D. 1882, of the circuit court of the United States of America, of the ninth judicial circuit in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday, the 29th day of January, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Lorenzo Sawyer, circuit judge.

G. D. NEWHALL
vs.
THEODORE LE ROY. } No. 2318.

In this cause, a bill of revivor having been filed, and counsel having appeared and filed an answer, and it appearing that Victor Le Roy, Eugene Le Roy, and George Le Roy, and E. J. Le Breton are necessary parties to an appeal, it is ordered that this suit be continued against E. J. Le Breton, administrator of the estate of Theodore Le Roy, deceased, and Victor Le Roy, Georges Le Roy, and Eugene Le Roy, heirs-at-law of Theodore Le Roy.

310 *Order Allowing Appeal to U. S. Supreme Court.*

At a stated term, to wit, the November term, A. D. 1882, of the circuit court of the United States of America, of the ninth judicial circuit in and for the district of California, held at the court-room in the city and county of San Francisco, on Monday, the 29th day of January, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Lorenzo Sawyer, circuit judge.

G. D. NEWHALL
vs.
E. J. LE BRETON, Administrator of the Estate of Theodore Le Roy, Deceased, *et al.* } No. 2318.

Now, at this day, on motion of Tully R. Wise, Esq., solicitor for complainant, it is ordered that an appeal from the decision rendered and the decree filed and entered in the cause entitled G. D.

Newhall against Theodore Le Roy (No. 2318), on the 20th
311 day of February, A. D. 1882, being a day in the February term, A. D. 1882, of said circuit court, to the Supreme Court of the United States be, and the same hereby is, allowed, and that a certified transcript of the pleadings, depositions, evidence, stipulations, and proceedings be forthwith transmitted to the Supreme Court of the United States upon the appellant giving a bond in the sum of five hundred dollars.

312 *Bond on Appeal.*

In the Supreme Court of the United States.

G. D. NEWHALL, Appellant,

vs.

E. J. LE BRETON, Administrator of the Estate of Theodore Le Roy, Deceased; VICTOR LE ROY, GEORGES LE ROY, and EUGENE LE ROY, Heirs-at-Law of Theodore Le Roy, Deceased, Appellees.

Know all men by these presents that we, Charles McLaughlin and Robert S. Thornton, as sureties, are held and firmly bound unto E. J. Le Breton, administrator of the estate of Theodore Le Roy, deceased; Victor Le Roy, Georges Le Roy, and Eugene Le Roy, heirs-at-law of Theodore Le Roy, deceased, the above-named appellees, in the sum of five hundred ($500) dollars, lawful money of the United States of America, to be paid to the said E. J. Le Breton, administrator of the estate of Theodore Le Roy, deceased; Victor Le
313 Roy, Georges Le Roy, and Eugene Le Roy, heirs-at-law of Theodore Le Roy, deceased, the successor or successors of the said Le Breton, in the administration of said estate, and the executors or administrators of said Victor Le Roy, Georges Le Roy, and Eugene Le Roy, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 29th day of March, A. D. 1883.

Whereas the above-named G. D. Newhall has taken an appeal to the Supreme Court of the United States to reverse the decree rendered by the circuit court of the United States of America, of the ninth judicial circuit in and for the district of California, in the suit entitled G. D. Newhall *versus* E. J. Le Breton, administrator of the estate of Theodore Le Roy, deceased; Victor Le Roy, Georges Le Roy, and Eugene Le Roy, heirs-at-law of Theodore Le
314 Roy, deceased, which said decree was filed and entered of record in said circuit court on the 20th day of February, 1882:

Now, therefore, if the above-named G. D. Newhall shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHARLES McLAUGHLIN. [SEAL.]
ROBERT S. THORNTON. [SEAL.]

Signed, sealed, and delivered in presence of—
JOS. F. O'BEIRNE.

UNITED STATES OF AMERICA, } ss:
District of California, }

Charles McLaughlin and Robert S. Thornton, being duly sworn, each for himself deposes and says that he is a resident and householder within said district of California and that he is worth the sum of five hundred dollars, exclusive of property exempt
315 from execution and over and above all his just debts and liabilities.

CHARLES McLAUGHLIN.
ROBERT S. THORTON.

Subscribed and sworn to before me this 29th day of March, A. D. 1883.

L. S. B. SAWYER,
Commissioner of U. S. Circuit Court, District of California.

(Endorsed:) I hereby approve the form of the within bond and the sufficiency of the sureties thereon. (Signed) Lorenzo Sawyer, U. S. circuit judge, 9th circuit. Filed March 29th, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

316 COMPLAINANT'S EXHIBIT A.

Whereas Theodore Le Roy, of San Francisco, Cal., is indebted to me in the sum of thirteen thousand dollars, or thereabouts, for professional services rendered and money paid to the Estudillo family, and which indebtedness was assumed by said Le Roy as part consideration of a certain trust deed given by said Estudillos to said Theodore Le Roy, dated on or about Oct. 1st, 1870:

Now, therefore, for value received, I, Wm. H. Patterson, of San Francisco, Cal., do hereby assign, transfer, and set over unto Charles McLaughlin, his heirs and assigns forever, all my right, title, and interest in and to the above-mentioned claim against the said Theodore Le Roy.

Witness my hand and seal the 30th day of January, A. D. 1880.

W. H. PATTERSON. [SEAL.]

Witness:
EDWARD KIRKPATRICK.

317 For value received I do hereby transfer, assign, and set over unto Edward Kirkpatrick, his heirs and assigns forever, all my right, title, and interest in, to, and under the foregoing instrument.

Witness my hand and seal the 7th day of April, 1880.

CHAS. McLAUGHLIN. [SEAL.]

For value received I do hereby transfer, assign, and set over unto G. D. Newhall, his heirs and assigns forever, all my right, title, and interest in, to, and under the foregoing instrument.

Witness my hand and seal the 7th day of April, 1880.

EDWARD KIRKPATRICK. [SEAL.]

318 COMPLAINANT'S EXHIBIT B.

In the District Court of the Third Judicial District of the State of California in and for the County of Alameda.

JUANA M. ESTUDILLO, JOSÉ RAMON ESTUDILLO, JOSÉ ANTONIO ESTUDILLO, Magdalena Estudillo Nugent, Wife of John Nugent, and John Nugent, Plaintiffs,

vs.

JOHN B. WARD and Others, Defendants.

Transferred from the District Court of the Twelfth Jud'l Dist. of San Francisco.

The above-named plaintiffs to S. M. Wilson, Dr.:

To professional services of the late firm of Wilson & Crittenden in the above cause ---------- $12,000 00

Secured by a certain conveyance of lands of the Estudillo estate and heirs to Theodore Le Roy in trust and subject to the conditions of said trust.

319 In consideration of friendship and esteem entertained by me for Mrs. Clara C. Crittenden and her late husband, Alexander P. Crittenden, deceased, I do hereby give, grant, assign, and set over unto the said Mrs. Clara C. Crittenden the whole of the foregoing debt, claim, and demand. And I do hereby make, constitute, and appoint said Mrs. Clara C. Crittenden my true and lawful attorney irrevocable to collect, recover, and receive (but at her own cost and expense) the foregoing claim and demand, and the same to retain, have, and possess for her own use.

In witness whereof I have hereunto set my hand this 15th day of February, A. D. 1872.

S. M. WILSON.

In presence of—
S. HEYDENFELDT.

320 COMPLAINANT'S EXHIBIT C.

For and in consideration of five dollars to me paid by G. D. Newhall, the receipt whereof is hereby acknowledged, I hereby assign to said Newhall all my right, title, and interest in and to any sum or sums of money due to me by virtue of a deed of trust made the first day of October, 1870, between Juana M. Estudillo, José Ramon Estudillo, José Antonio Estudillo, José Vicente Estudillo, Luis D. Estudillo, Jesus Maria Estudillo, Magdalena E. Nugent, and John Nugent, parties of the first part, and Theodore Le Roy, party of the second part, and by virtue of assignments of parties interested therein, *and* I assign, transfer, and set over to said G. D. Newhall all claims and demands which I now have against Theodore Le Roy arising out of said deed of trust or however arising, and I authorize him to sue for the same in his own name, and I transfer and assign to him all my right, title, and interest in and to said deed of trust.

In witness whereof I hereto set my hand and seal this —day of May, A. D. 1880.

C. C. CRITTENDEN. [SEAL.]

321 DEFENDANTS' EXHIBIT 1.

COUNTY OF ALAMEDA, *ss:*

SHERIFF'S OFFICE.

I hereby certify that I received the within summons on the 20th day of June, A. D. 1870, and personally served the same upon the hereinafter-named defendant by delivering to and leaving with him personally, in the county of Alameda, at the time set opposite his name, a copy of said summons; and I further certify that the copy so delivered to and left with said defendant was attached to a certified copy of the complaint referred to in said summons.

Names of defendants served: José Ramon Estudillo; time of service, Oct. 10th, 1870.

Dated at San Leandro this 10th day of Oct., 1870.

H. N. MORSE, *Sheriff*,
By P. R. BOREM, *D. S.*

COUNTY OF ALAMEDA, *ss:*

SHERIFF'S OFFICE.

322 I hereby certify that I received the within summons on the 21st day of February, A. D. 1870, and personally served the same upon the hereinafter-named defendants by delivering to and leaving with each of them personally, in the county of Alameda, at the time set opposite their names, a copy of said summons attached to a certified copy of the complaint referred to in said summons.

Names of defendants served.	Time of service.
John Nugent,	Feb'y 21st, 1870.
José Antonio Estudillo,	Feb'y 21st, 1870.
John B. Ward,	Feb'y 21st, 1870.
John B. Ward, executor of the estate of Concepcion A. Ward, deceased,	Feb'y 21st, 1870.
Charles H. Cushing,	Feb'y 21st, 1870.
T. W. Mulford,	Feb'y 21st, 1870.
Magdalena Estudillo Nugent,	Feb'y 28th, 1870.
Dolores Estudillo Cushing,	Feb'y 28th, 1870.
Jesus Maria Estudillo,	Mar. 11th, 1870.

Dated at San Leandro this 5th day of May, 1870.

HENRY N. MORSE, *Sheriff.*

323 CITY AND COUNTY OF SAN FRANCISCO, *ss:*

SHERIFF'S OFFICE.

I hereby certify that I received the annexed summons on the 11th day of May, A. D. 1870, and personally served the same on the same day upon Theodore Le Roy, one of the therein-named defendants, by delivering to him personally, in the city and county of San Francisco, a copy of said summons attached to a certified copy of the therein-mentioned complaint.

P. J. WHITE, *Sheriff*,
By A. M. BOWEN, *Deputy.*

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

SHERIFF'S OFFICE.

I hereby certify that I received the annexed summons on the 11th day of May, A. D. 1870, and personally served the same on the 24th day of May, A. D. 1870, upon L. L. Robinson, being one of the therein-named defendants, by delivering to the said defendant personally, in the city and county of San Francisco, a copy of said summons attached to a certified copy of the complaint in said action therein named.

P. J. WHITE, *Sheriff*,
By H. PERRENBACH, *Deputy*.

324 In the District Court of the Third Judicial District of the State of California in and for the County of Alameda.

THE HIBERNIA SAVINGS AND LOAN SOCIETY, Plaintiff,
vs.
JOHN B. WARD *et als.*, Defendants.

Action brough- in the district court of the third judicial district of the State of California and the complaint filed in the county of Alameda in the office of the clerk of said district court.

The people of the State of California send greeting to John B. Ward, Juana M. Estudillo, José Ramon Estudillo, José Luis Estudillo, José Antonio Estudillo, José Vicente Estudillo, Jesus Maria Estudillo, Charles H. Cushing and his wife, Dolores Estudillo Cushing; John Nugent and his wife, Magdalena Estudillo Nugent; William H. Davis and his wife, Maria J. Estudillo Davis; L. L. Robinson;
325 John B. Ward, executor of the estate of Conception A. Ward, deceased; Juana Sophia Ward and John Francis Ward, infants; Theodore Le Roy, and T. W. Mulford:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the State of California in and for the county of Alameda, and to answer the complaint filed therein (a copy of which accompanies this summons) within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; if served out of this county, but within this judicial district, within twenty days, or if served out of said district then within forty days, or judgment by default will be taken against you.

The said action is brought to obtain a decree of this court for the foreclosure of two mortgages described in the complaint executed by the said John B. Ward and Conception A. Ward, his wife, one dated April 11th, 1866, and the other dated April 22d, 1868,
326 the said first mortgage to secure the promissory note of said John B. Ward for the sum of one hundred and twenty-five thousand dollars, bearing even date with said first mortgage, and delivered therewith, payable six years after date with interest thereon at the rate of one per cent. per month, payable monthly in advance, and if not so paid to be added to the principal and become a part thereof and bear interest at the same rate, and principal

and interest payable in gold coin of the United States; and the said second mortgage, to secure the promissory note of said John B. Ward for the sum of fifty thousand dollars, bearing even date with said second mortgage and delivered therewith, payable six years after date, with interest thereon at the rate of one per cent. per month, payable monthly in advance, and if not so paid to be added to the principal and become a part thereof and bear interest at the same rate, and principal and interest payable in gold coin of the United States, as by reference to said two promissory
327 notes, etc., particularly set forth in the complaint, will more fully appear, said decree of foreclosure being demanded because the interest on said notes and sums of money was not paid as provided in said notes and mortgages; and to obtain an order that a receiver be appointed to take charge of the lands and premises, as provided in said mortgages, with full power to lease, let, and receive the rents and profits thereof, and pay all taxes, liens, etc., now subsisting, or which may be levied during the pendency of this action, upon the mortgaged premises, or upon the mortgages, or the moneys secured thereby, and that the premises conveyed by said mortgages may be sold for gold coin of the United States, and the proceeds applied to the payment of the said sums of one hundred and twenty-five thousand dollars and fifty thousand dollars, with interest thereon as aforesaid, principal to be paid in like gold coin and according to the terms of said notes, together with all costs, taxes, assess-
328 ments, or other incumbrances found due on the mortgaged premises, or on said mortgages, or the money secured thereby, and also counsel fees in this action, as provided in said mortgages, and to be paid in like coin, and in case such proceeds are not sufficient to pay the same then to obtain an execution against said defendant, John B. Ward, for the balance remaining due; and also that the said defendants, and all persons claiming by, through, or under them, may be barred and foreclosed of all right, title, claim, lien, equity of redemption, and interest in and to said mortgaged premises, and for other and further relief.

And if you fail to appear and answer the said complaint as above required the plaintiff will take default against you, and apply to the court for the relief demanded in the complaint.

Given under my hand and the seal of the district court of the third judicial district this 19th day of February, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] I. A. AMERMAN, *Clerk.*

(Endorsed): No. 2356. In the district court of — third judicial district, Alameda county. The Hibernia Savings and Loan Society *vs.* John B. Ward *et als.* Summons. Rec'd Feb'y 21st, 1870. Rec'd June 20, 1870. Rec'd May 11, '70, at 3.40 p. m. Richard Tobin, plaintiff's attorney.

329 DEFENDANTS' EXHIBIT 2.

Resolved, That the mortgage made and executed on the 11th day of April, A. D. 1866, by John Ward and Concepcion A. Ward, his

wife, to the Hibernia Savings and Loan Society, a corporation, which mortgage is recorded in the office of the county recorder of the county of Alameda, State of California, in liber K of mortgages, at page 724, and in the office of the county recorder of the county of Santa Barbara, said State, in liber A of mortgages, page 485, and the other mortgage made and executed on the 22d day of April, A. D. 1868, by said mortgagors to said mortgagee, which said mortgage is recorded in the office of the county recorder of said Alameda county in liber P of mortgages, at page 317, and in the recorder's office of said Santa Barbara county in liber B of mortgages, at page 68, be released and discharged, together with the debts thereby secured, and that Myles D. Sweeney, the president of said corporation,
330 be, and he is hereby, authorized to release and discharge the same, and for that purpose to subscribe the name and affix the corporate seal of the said corporation, to a good and sufficient release of the same.

A true copy of an original resolution passed by the board of directors of the Hibernia Savings and Loan Society on the 23d day of July, A. D. 1872.

[SEAL.] EDWARD MARTIN,
Secretary of the Hibernia Savings and Loan Society.

Now, therefore, know all men by these presents that the Hibernia Savings and Loan Society, a corporation, in conformity with the above resolution of its board of directors, which resolution is hereby referred to and made part hereof, does hereby certify and declare the above mentioned and described mortgages, together with the debts thereby secured, to be fully paid, satisfied, and discharged.

In witness whereof the said The Hibernia Savings and Loan
331 Society has caused these presents to be subscribed by Myles D. Sweeney, the president of said corporation, and its corporate seal to be hereunto affixed this 23d day of July, 1872.

[SEAL.] THE HIBERNIA SAVINGS AND LOAN SOCIETY,
By MYLES D. SWEENEY, *President.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On this 23d day of July, A. D. one thousand eight hundred and seventy-two, before me, John Hamill, a notary public in and for the said city and county, duly commissioned and sworn and residing therein, personally appeared the within-named Myles D. Sweeney, president of the Hibernia Savings and Loan Society, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the individual described in and who executed the said annexed instrument, and the said Myles L. Sweeny duly acknowledged to me that he executed the same freely and
332 voluntarily and for the uses and purposes therein mentioned, and as his act and deed as president aforesaid.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] JOHN HAMILL,
Notary Public.

Recorded in the county recorder's office, Alameda county, April 22d, 1874, at fifty minutes past 3 p. m., in liber 45, mortgages, p. 23.

B. S. MARSTON,
County Recorder.

Recorded at request of Wells, Fargo & Co., August 6, A. D. 1874, at 4 o'clock p. m., in liber "A" of releases of mortgages, in page- 252, 253, & 254.

[SEAL.] H. P. STONE,
County Recorder,
By JOHN JAUSSENS,
Deputy Recorder.

Recorded at the request of R. Steinbach, April 22d, 1874, at 50 minutes past 3 o'clock p. m., in liber 45 of mortgages, page 23.

333 (RESPONDENT'S EXHIBIT 3.)

Mortgage made by Juana Martinez Estudillo, widow, and others to the Hibernia Savings and Loan Society, dated August 29th, 1861, and recorded in the office of the county recorder of the county of Alameda, State of California, in book E of mortgages, at page 762, and re-recorded in said county in book E of mortgages, at page 774, and recorded in the office of the county recorder of Contra Costa county in volume 3 of mortgages, at page 98.

Mortgage made by Juana M. Estudillo and others to the Hibernia Savings and Loan Society, dated March 14th, 1863, and recorded in the office of the county recorder of said Alameda county in book G of mortgages, at page 575, and in the office of the county recorder of the county of Santa Barbara, State aforesaid, in book A of mortgages, at page 362, and in the recorder's office of said Contra Costa county in volume 3 of mortgages, page 393.

Mortgage made by Juana M. Estudillo and others to the Hibernia Savings and Loan Society, dated May 20th, 1863, and re-
334 corded in said recorder's office of Alameda county in book G of mortgages, at page 725, and in said recorder's office of the county of Santa Barbara in book A of mortgages, at page 366, and in said recorder's office of Contra Costa county in volume 3 of mortgages, at page 422.

Mortgage made by Juana M. Estudillo and others to the Hibernia Savings and Loan Society, dated January 19th, 1864, and recorded in said recorder's office of Alameda county in book H of mortgages, at page 580.

The Hibernia Savings and Loan Society, a corporation, hereby declares the above-described mortgages and the debts thereby secured to be fully paid and discharged.

Witness the corporate name and seal of said corporation hereunto

subscribed and affixed by Myles D. Sweeny, its president, in pursuance of a resolution of its board of directors, this fifth day of May, 1874.

[SEAL.] THE HIBERNIA SAVINGS AND LOAN SOCIETY,
By MYLES D. SWEENY, *President.*

335 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On this 5th day of May, in the year 1874, before me, John Hamill, a notary public in and for said city and county, personally appeared Myles D. Sweeny, known to me to be the person whose name is subscribed to the within instrument and the president of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

[SEAL.] JOHN HAMILL,
Notary Public.

Recorded in county recorder's office, Alameda county, May 12, 1874, at 3 mins. past 11 a. m., in liber 45, mortgages, pp. 111.

B. S. MARSTON,
County Recorder.

336 Recorded at request of Wells, Fargo & Co., August 6th, A. D. 1874, at 4 o'clock p. m, in liber "A," releases of mortgages, pp. 251 & 252.

[SEAL.] H. P. STONE,
County Recorder,
By JOHN JANSSENS,
Deputy Recorder.

Recorded at request of T. Le Roy, May 12, 1874, at 3 mins. past 11 a. m., in liber 45 of mortgages, p. 111.

1 E X 2.
Aug. 29, '61, E, 774.
M'ch 14, '63, G, 575.
May 20, '63, G, 725.
Jan'y 19, '64, H, 580.

337 RESPONDENT'S EXHIBIT 4.

Estudillo & Others to Theodore Le Roy. Deed of trust dated Oct. 1, 1870.

The amount of indebtedness of $446,849.00 acknowledged in the deed of trust was composed of the following sums:

Debt to Hibernia Savings & Loan Society by John B. Ward, assumed to be paid by Theodore Le Roy, as stated in the deed of trust ---------- $218,372 12

This debt was secured by two mortgages of John B. Ward & wife, one for $125,000, the other for $50,000, on the ranchos San Leandro, Guadalupe, and Casmolia (& probably El Cojo or P. de la Concepcion). (The Hibernia also held four other mortgages made by Juana M. Estudillo, Ward, & others previous to the above 2 m'tg'g's, and these four mortgages were released only after the above debt had been paid.) The Hibernia had commenced suit to foreclose the two mortgages in the 3d dist. ct., Alameda county, Feb'y 19, 1870.

Debt to Theodore Le Roy by Juana M. Estudillo & others, Oct. 1, 1870	$71,592 58	
338 M'tgage of Juana M. Estudillo & others, dated Sept. 9, 1868, for $45,000.00 on the ranchos San Leandro, Guadalupe, Casmolia, and El Cojo or Puenta de la Concepcion.		
M'tgage by same parties, dated Jan'y 21, 1870, for $7,500.00 on the same property.		
M'tgage by Juana M. Estudillo, dated Nov. 10, 1868, for $3,000 on blocks 32 and "Court square," in town of San Leandro.		
M'tgage by Juana M. Estudillo, dated Dec. 12, 1868, for $3,000 on blocks 32 and "Court square," in town of San Leandro.		
Payment to John B. Ward by Theodore Le Roy Oct. 1, 1870	$100,000	
Suit had been instituted by Juana M. Estudillo & others against John B. Ward & others, June 3, 1868, in the 12th dist. ct. to set aside deeds, &c., &c.; a conveyance was agreed upon; Ward was to receive the above sum of $100,000, was to retain the rancho El Cojo or Puenta de la Concepcion, and Ward & the other defendants were to convey to Juana M. Estudillo the ranchos Guadalupe, Casmolia, certain swamp lands, and the rancho San Leandro, except certain portions thereof. This compromise was affected after Le Roy had agreed to assume the debt of the Hibernia Bank and to pay the $100,000 to Ward and to pay the fee of $7,500 to Rich'd Tobin.		
Payment to Richard Tobin for fee for foreclosure of Hibernia mortgage	$7,500	
Payment for $447 U. S. revenue stamps used on deed of trust	385	
	$397,849 70	
Debt of Estudillo family to Felton, Wilson, & Patterson for fee charged by Felton in making said compromise	49,000	
Indebtedness Oct. 1, 1870, as stated in deed of trust	$446,849	

339 RESPONDENT'S EXHIBIT 5.

[Int. rev. stamp, 5 cents.]

Know all men by these presents that I, Theodore Le Roy, of the city and county of San Francisco, State of California, for and in consideration of the sum of five dollars, to me in hand paid, the receipt whereof is hereby acknowledged, have released, cancelled, and discharged, and by these presents do release, cancel, and discharge, that certain indenture of mortgage bearing date on the ninth day of September, A. D. one thousand eight hundred and sixty-eight, and recorded in the office of the county recorder of the county of Alameda, in liber Q of mortgages, page 645, *et seq.*, and which said mortgage was made and executed by Juana M. Estudillo and others to me, Theodore Le Roy, upon certain premises in said mortgage described, to secure the payment of the sum of forty-five thousand dollars, with interest thereon, at the rate of one and one-quarter per cent. per month, according to the terms of a certain promis-
340 sory note in said mortgage set forth.

Also that certain other mortgage bearing date on the tenth day of November, A. D. one thousand eight hundred and sixty-eight, and recorded in the office of the county recorder of said Alameda county, in liber Q of mortgages, page 743, *et seq.*, and which said mortgage was made by Juana M. Estudillo to me, Theodore Le Roy, upon certain premises therein described, to secure the payment of the sum of three thousand dollars, with interest thereon, according to the terms of a certain promissory note in said mortgage set forth.

Also that certain other indenture of mortgage bearing date on the twelfth day of December, A. D. one thousand eight hundred and sixty-eight, and recorded in the office of the county recorder of said Alameda county, in liber R of mortgages, page 136, *et seq.*, and which said mortgage was made by Juana M. Estudillo to me, Theodore Le Roy, upon certain premises therein described, to secure the
341 payment of the sum of three thousand dollars, with interest thereon, according to the terms of a certain promissory note in said mortgage set forth.

Also that certain other indenture of mortgage bearing date on the twenty-first day of January, A. D. one thousand eight hundred and seventy, and recorded in the office of the county recorder of said Alameda county, in liber T of mortgages, pages 668 *et seq.*, and which said mortgage was made by Juana M. Estudillo *et al.* to me, Theodore Le Roy, upon certain premises therein described, to secure the payment of seventy-five hundred dollars, with interest thereon, according to the terms of a certain promissory note in said mortgage set forth.

And I do hereby certify and acknowledge that the said promissory notes and the said mortgages are fully paid and satisfied.

In witness whereof I have hereunto set my hand and seal the first day of October, A. D. one thousand eight hundred and seventy.

(S'g'd) LE ROY, TH.

Signed, sealed, and delivered in the presence of—

H. C. NEWHALL.

342 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this eleventh day of October, A. D. one thousand eight hundred and seventy, before me, James G. Carson, a notary public in and for said city and county and residing therein, duly commissioned and sworn, personally appeared the within-named Theodore Le Roy (who signs Le Roy, Th.), whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the individual described in and who executed the within instrument, and he duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in said city and county of San Francisco, the day and year in this certificate last above written.

[SEAL] JAMES G. CARSON,
Notary Public.

STATE OF CALIFORNIA, } ss:
County of Alameda, }

343 This instrument is recorded in the recorder's office of Alameda county in liber W of mortgages, pp. 8, 9, 10.
Recorded Oct. 12, 1870, at 45 min. past 8 o'clock a. m.

B. S. MARSTON,
Recorder.

Dated Oct. 1, 1870.

Recorded at request of J. M. Estudillo, Oct. 12, 1870, at 45 mins. past 8 o'c. a. m., in book W, m'tg's, Alameda Co., p-. 8, 9, 10.

344 RESPONDENT'S EXHIBIT 6.

Law office of Patterson, 609 Sacramento street.

SAN FRANCISCO, *May* 16, 1871.

Mr. T. Le Roy:

I advise that you authorize the auctioneer to announce that you will give a warranty deed for all the San Leandro rancho you sell.

R. yours,

WM. H. PATTERSON.

345 RESPONDENT'S EXHIBIT 7.

MARCH 7, 1872.

Mr. T. Le Roy:

I was surprised this afternoon at receiving the within; will you please attend to the matter, and oblige,

Yours very truly, WM. H. PATTERSON.

346 RESPONDENT'S EXHIBIT 8.

No. 1.

The Western Union Telegraph Company.

The rules of this company require that all messages received for transmission shall be written on the message blanks of the company, under and subject to the conditions printed thereon, which conditions have been agreed to by the sender of the following message:

WILLIAM ORTON, *President.*
G. H. MATUFORD, *Secretary.*

JAMES GAMBLE,
Gen'l Supt., San Francisco.

5.

SAC'TO, *M'ch* 7, 1872.

Received at San Francisco, 7, 18, 3 p. m.

To Wm. H. Patterson, Patterson & Stow:

Make Le Roy telegraph immediately; this delay most mischievous and hazardous.

JOHN NUGENT.

10 p'd.

347 RESPONDENT'S EXHIBIT 9.

WM. H. PATTERSON, LAW OFFICE,
Jun. 13, 1872.

Mons. T. Le Roy:

As attorney of the Estudillo family, I authorize you to contract with Mr. Williams, at Washington, that if he obtains, within 60 days from July 1, and there shall be forwarded to the U. S. surveyor gen. for California, the patent for Guadalupe rancho, with order to deliver it to you or me, his draft, at 5 days' sight, for ($5,000) five thousand dollars will be honored by you.

Respectfully, &c., WM. H. PATTERSON.

348 RESPONDENT'S EXHIBIT 10.

SAN FRANCISCO, *Oct.* 18, 1876.

SIR: As counsel for the Estudillo family I request that you will furnish me with a statement of the terms and conditions on which you will release the San Leandro property to the family; also of the amount of land remaining unsold of the ranchos San Leandro, Cosmolia, and Guadalupe.

Your ob'd't servant, WM. H. PATTERSON.

To Theodore Le Roy, Esq., San Francisco.

349 RESPONDENT'S EXHIBIT 11.

WM. H. PATTERSON, 609 SACRAMENTO STREET,
SAN FRANCISCO, CAL., *Nov.* 17, 1876.

Theodore Le Roy, Esq.

DEAR SIR: For greater accuracy please to send me, by bearer, a memorandum in brief of the terms and date of the contract with Congdon; also, in brief, of the condition as to indebtedness, &c., of the three ranchos of the Estudillo estate, deducting the amount of the contemplated sale and the credits on outstanding mortgages.

Everything merely in round numbers.

I wish an answer to-day.

Respectfully, WM. H. PATTERSON.

[In pencil:] For answer see memo. in letter-b'k, page 325.

350 RESPONDENT'S EXHIBIT 12.

VIRGINIA, NEVADA, *Feb.* 4, 1874.

M. Le Roy:

More than six months ago I made a demand on you, as trustee of the estate of the Estudillo family, for payment to me of the sum of $8,000, counsel fees for services rendered in the matter of the Guadalupe rancho. I now reiterate that demand, and I make this proposition: that you pay me now $1,000, and that the remainder stand until your debt shall be paid, and that the remaining $7,000 shall be paid at the same time the other counsel fees shall be paid.

I desire that this debt shall be recognized now. It is not just to my family that it should remain longer without recognition. I have been now working in these cases for six years without one
351 dollar of remuneration, and I am tired of it.

I will thank you to show this letter to Mr. Felton and Mr. Patterson, and to reply to it at your earliest convenience.

Your ob't serv't,

JOHN NUGENT.

M. Theodore Le Roy.

352 RESPONDENT'S EXHIBIT 13.

To Messrs. J. B. Felton, S. M. Wilson, and W. H. Patterson.

GENTLEMEN: I hereby certify that you are entitled to the following sums, payable out of a certain deed of trust made to me the —— day of ——, A. D. 1870:

J. B. Felton, to the sum of $25,000; S. M. Wilson, to the sum of $12,000; W. H. Patterson, to the sum of $12,000.

These sums are to be paid, principal and interest, from the date of said deed, as soon as I shall be entirely reimbursed, principal, interest, advances, and expenses.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the fore-
353 going to be a full, true, and correct copy of the original "Respondent's Exhibit No. 13" in the cause entitled "G. D. New-

hall *versus* Theodore Le Roy," as the same now remains on file and of record in my office.

Attest my hand and seal of said circuit court this 9th day of December, A. D. 1882.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:) Filed Dec. 9th, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

354 RESPONDENT'S EXHIBIT 14.

SAN FRANCISCO, 27 *Sept.*, 1871.

To Messrs. J. B. Felton, S. M. Wilson, and W. H. Patterson, present.

GENTLEMEN: I hereby certify that you are entitled to the following sums, payable payable out of a certain deed of trust made to me the first day of October, A. D. 1870, by Juana M. Estudillo, José Ramon Estudillo, José Antonio Estudillo, José Vicento Estudillo, Luis D. Estudillo, Jesus Maria Estudillo, Magdalena E. Nugent, and John Nugent—that is to say:

J. B. Felton, Esq., to the sum of twenty-five thousand dollars; S. M. Wilson, Esq., to the sum of twelve thousand dollars; W. H. Patterson, Esq., to the sum of twelve thousand dollars.

These sums are to be paid, principal and interest, from the date of said deed as soon as I shall be entirely reimbursed princi-
355 pal, interest, advances, and expenses.

Respectfully yours, &c.,
(Signed) LE ROY, TH.

This is the true understanding about the above interests.
Sept. 27th, 1871.
(Signed) JOHN B. FELTON.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing to be a full, true, and correct copy of the original "Respondent's Exhibit 14" in the cause entitled "G. D. Newhall *versus* Theodore Le Roy," as the same remains on file and of record in my office.

Attest my hand and seal of said circuit court this 9th day of December, A. D. 1882.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:) Filed Dec'r 9, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

356 RESPONDENT'S EXHIBIT 15.

From the records of Alameda county.

Juana M. Estudillo, José Anto. Estudillo, José Ramon Estudillo,

José Vicente Estudillo, Luis D. Estudillo, Magdalena E. Nugent (each by attorney-in-fact, John Nugent), and John Nugent to Theodore Le Roy, mortgage, Sept. 9, 1868, for $45,000.00, on ranchos San Leandro, Guadalupe, Cosmolia, and El Cajo or Puenta de la Concepcion. Recorded in b'k Q. of mortgages, p. 645.

Same parties to Theodore Le Roy, mortgage, Jan'y 21, 1870, for $7,500.00, on same property as the mortgage of $45,000.00. Recorded in b'k T of mortgages, p. 668.

Juana M. Estudillo to Theodore Le Roy, mortgage, Nov. 10, 1868, for $3,000.00, on block 32 and "Court square" in town of San Leandro. Recorded in b'k Q of mortgages, p. 743.

357 Juana M. Estudillo to Theodore Le Roy, mortgage, Dec. 12, 1868, for $3.000.00, on block 32 and "Court square" in town of San Leandro. Recorded in b'k R of mortgages, p. 136.

358 RESPONDENT'S EXHIBIT 16.

In the District Court of the Third Judicial District (transferred from the Twelfth) of the State of California in and for the county of Alameda.

JUANA M. ESTUDILLO, JOSÉ RAYMOND ESTUDILLO, JOSÉ ANTONIO Estudillo, Luis D. Estudillo, Magdalena Estudillo Nugent, wife of John Nugent; John Nugent, husband of said Magdalena, Plaintiffs,

vs.

JOHN B. WARD *et al.*, Defendants.

Abstract of Answer.

The defendants, John B. Ward, Charles H. Cushing, and Dolores Estudillo Cushing, jointly and severally answering the amended complaint of the plaintiff in the above-entitled action, deny
359 that Jose Joaquin departed his life in the then county of Contra Costa, aver that he died in San Francisco; deny that at the time of his death he was only indebted to the extent of a few trifling debts; deny that when his estate was administered and executors discharged the personal property of said estate had been little, if at all, diminished in quantity or number; aver in relation to the condition of said estate at the time of Jose Joaquin's death, and thence up to the time of the discharge of the executors, to be in truth that José Joaquin was indebted at time of his death to various persons in sums amounting in the aggregate to $15,000 or thereabouts; that his claim to the lands of San Leandro had not been confirmed, but proceedings were pending for confirmation before the board of land commissioners; that squatters had taken possession of 2,000 acres and upward of said lands, and he had only about 200 acres in possession cultivated, and his only
360 possession of the residue was by his cattle grazing. Proper management of crops on said 200 acres would have paid debts, but through gross neglect and mismanagement of executors, particularly Davis, the same did not produce more than $5,000 or

$6,000. Shortly after harvesting said crop adverse possession was taken of said 200 acres and of nearly all the balance of ranch and possession of all of San Leandro lands lost, except the immediate parts where family resided, and continued lost until after expensive, protracted, harrassing litigation they were *required*.

That personal property of the estate consisted chiefly of cattle at [the] time of his death on San Leandro; but, in consequence of adverse possession of squatters and the placing of some 1,400 head of his own there by Davis, they had to be removed to the Pinole ranche, 30 miles from San Leandro. Many were lost in transit; many perished from the weather; many were stolen.

361 In May, 1853, a number of cattle, valued [at] $4,000, were given to said Davis in full settlement of his claims. A division took place among the heirs and legatees, adult heirs and legatees taking their own, and Juana M. Estudillo, acting as guardian, took charge of the shares of the minors, and thereafter the said cattle were owned in severalty; that prior to discharge of the executors, on July 6, 1856, [the] estate was indebted to Davis, one of [the] executors, in about $4,000, to pay which there were no available funds. To pay same, close the administration, prevent forced sale of San Leandro rancho by Davis under proceedings in probate court, plaintiffs, Juana M., José Ramon, José Antonio, by their attorney, and defendant, John B. Ward, executed joint note to Davis, payable in one year, for said said sum, by which, at the time of the discharge of executors and close of administration, the debts were apparently

362 paid, but in fact were not and the interest of devisees was liable therefor and interest, and the estate was then and for years afterwards *and for years afterwards* almost wholly unproductive, being in possession of squatters.

Deny rancho San Leandro contains 7,010.84 acres; aver it contains 6,829.38 acres.

Admit marriage of John B. and Maria Concepcion Ward; aver latter's death since institution of this suit, viz., 29 July, 1868.

Avers the marriage of def'ts, Charles H. Cushing and Dolores, to have taken place August 14, 1864.

Aver, in relation to the interest of Juana M. in Pinole rancho, the truth to be she inherited — undivided $\frac{1}{11}$ from her father (about 1,500 or 1,600 acres). In 1853 she bought another $\frac{1}{11}$th with cattle bequeathed by her husband. Subsequently acquired another undivided $\frac{1}{11}$th from plaintiff, José Ramon, in discharge of indebtedness, or part thereof, to — estate of José Joaquin, and in 1857 she acquired $\frac{1}{3}$ of $\frac{1}{11}$ with funds of — estate of José Joaquin, all of

363 which interests amounted in — aggregate to almost 5,400 acres, and no more.

Deny that after executors were discharged from administration of estate of José Joaquin the interests of the devisees and legatees remained in common or undivided.

Deny that it was managed or controlled by Davis and Ward until April, 1858; that Davis then retired and left management to Ward.

Avers that after division in 1853 each held in severally. The shares of Juana M. and minor heirs was by her placed under con-

trol of José Antonio on Pinole rancho, and never were afterwards under the control of Ward alone or with Davis, as regards the real estate.

Subsequent to Ward's marriage he counselled and advised with Juana M. and Davis and adult advisees as to the prosecution and defense of their right to San Leandro lands, but did not be-
364 come their attorney-in-fact until Feb'y 28, 1854.

Acted as attorney in fact for all devisees except wife of Davis from that date until Feb'y 8, 1855, on which day Ward and Davis were appointed agents of devisees, and acted as such until December 15, 1858, during all of which time Ward devoted his time and earnest attention to affairs of said devisees.

Davis did not retire from said agency till December 15, 1858.

That during the agency Davis acted as cashier and treasurer, Ward as business man; agency so conducted till April, 1858, time of Ward's contemplated departure for Washington, D. C. Up to that date Davis had never accounted with Ward or the devisees as to his receipts and disbursements; put it off on one pretext or another; that Ward, intending to go to Washington, deemed it necessary and proper there should be an accounting, and compelled Davis to account April 19, 1858.

365 April 20, 1856, Ward went to Washington; absent until September, 1858.

That Davis at an early day conceived the idea to despoil the devisees of their estate and appropriate it to himself; broached the idea to Ward, who indignantly spurned it and its author, and would not thereafter have acted with Davis but that Davis' wife was devisee under will, and Davis thereby controlled undivided interest in property, and could thereby embarrass other devisees or Ward, acting on their behalf, from recovering possession from squatters by leasing infinitesimal interests. By reason of close watch kept by Ward, and rigid accounting compelled by him, Davis was foiled in despoiling the devisees and appropriating the estate; and supposing and giving out that estate was hopelessly involved, and funds to save it could not be borrowed, and *became* exasperated towards Ward, the devisees, and the welfare of their estate, *and* during Ward's absence acted *co*uvertly with the squatters and
366 with hostility to the interests of the devisees.

On Ward's return, September, 1858, finding this condition of affairs, he was compelled to assume the sole acting management of estate, although Davis continued as joint agent.

Deny that Davis retired from management April, 1858, except as herein stated.

Deny that in April, 1858, estate [was] little indebted.

Deny that property was unincumbered except to extent of $14,000, but aver it owed $26,000 to third parties, $30,000 to Ward for services, and was encumbered to the extent of $25,500.

Deny that $20,000 in April, 1858, was due estate by solvent debtors, or that Ward collected that sum or upwards; aver amount due estate did not exceed $15,000, which Ward collected and accounted for.

Deny that devisees or legatees were, up to April, 1858, supported out [of] the rents and profits of said lands or personal property otherwise than as set up in this answer.

367 Aver that after their marriages the wives of Davis and Ward were supported by their husbands; that minor heirs were maintained partly by sales of personal property and partly by borrowed moneys; that José Ramon used part of the personalty coming to him in purchase of an interest in El Pinole rancho; that José Antonio resided on El Pinole from division of cattle (1853) to 1858. Juana M. purchased an interest in Pinole with her cattle; that the cattle coming to the wife of Davis and to wife of Ward were removed to another part of Pinole. Davis afterwards disposed of his wife's share. Those of Ward's wife were first under charge of José Ramon and then of José Antonio, who dissipated nearly all of them.

The San Leandro lands were the only productive property of estate; only small portion in possession of devisees, yielding nominal rent; the balance in possession of squatters; the income absorbed in expenses of litigations, but did not nearly pay same.

368 Deny that after Davis ceased to participate in management of property Ward managed the same, professedly or otherwise, for the benefit of the devises, except as herein stated, until December 15, 1858.

Deny that during the 8 months preceding December 15, 1858, Ward borrowed money to amount of $5,000, or that at his instance devisees joined in a mortgage, or that he borrowed same during 8 months, or that it was borrowed for his own ends, or that the devisees got no benefit from it.

Avers in regard to said $5,000 that it was borrowed to pay the expenses of said Ward to Washington to obtain a dismissal of the appeal in the U. S. Supreme Court in regard to the San Leandro lands; that $6,000 was secured by mortgage executed by Juana M., José Antonio, José Ramon, and José Vicente; that by consent of plaintiffs José Antonio accompanied Ward to Washington; that

369 Ward received $4,500 of the $6,000; paid traveling expenses $4,200, and for private purposes $300; left balance, $1,500, with M. Murphy in California, which was paid to Juana M. (through Davis) at her request; that Ward raised $1,500 to replace it by drawing bills of exchange; that all the money except $300 was applied as aforesaid, and the devisees had the benefit; that he went to Washington for [the] sole purpose of prosecuting or procuring dismissal of appeal, and succeeded in getting it dismissed.

Deny that Juana was or is unused to business, or selling, or buying, or dealing with real property, but avers that she is a shrewd business woman, and in all transactions touching the estate would only act after full explanation & understanding it; similar averments and denials as to the business capacities and education of the children.

Deny that after said Davis ceased to manage their affairs they all looked to the defendant Ward to do so.

370 Deny that they or any of them placed explicit confidence in him or as a relative or good management as a man — business.

Deny that said widow and children up to within 8 months placed the utmost trust or reliance on Ward, or did not hesitate to surrender to him the management of their — without question or suspicion, or that after Davis ceased to participate in the management of the property Ward controlled the family or dictated or determined what should be done in relation to their property, or that his control was submitted to because of his relationship, or that by means of his wife or artfully or otherwise he obtained control over Juana M., or that she implicitly complied with his requests in all respects in conveying, mortgaging, or buying her own or her children's property and deny that said Juana believed, as alleged in complaint, in said Ward's honest*ly* of purpose or fidelity.

Aver that, after his marriage with Concepcion, Ward won
371 the esteem of Juana and children and retained the same until 3 months before commencement of this suit, when, for their own purposes, José Antonio and José Nugent soured the minds of Juana and children against him and wrought an estrangement between them; that the confidence of Juana and children in him was not of a blind and unlimited character, but arose from his invariably acting with utmost candor, frankness, integrity, and devotion to their interest.

That Juana did not repose implicit confidence in any person; always has been an unus-ally cautious woman, and would never act until fully advised, and Ward consulted her always in relation to the matters touching the estate. Davis represented his wife in these matters.

Juana or children did not surrender to Ward absolute control of the estate, but he managed with their consent and took no
372 steps without their approval, nor did he dictate what they should do, but merely, as a relative, advised what he thought was their best interest, and defendants believe that but for Ward's devotion the estate would have been lost long since.

(Here follow denials of all the averments made on page 4 of complaint, lines 20 to 53.)

Aver that Ward did not make any representations in 1858 to Davis or plaintiffs to induce Davis to withdraw, but used all arguments to prevail on him to continue in the management, but he retired for the avowed purpose of embarrassing Ward and the devisees, and contrary to the entreaties of Ward, Juana, and José Antonio.

Davis, at and after retirement, threatened to ruin the devisees; said the estate was hopelessly involved in debt; sought to get creditors to press their claims, — to spreading injurious reports, and, although married to one of the devisees, repudiated the title
373 of *title of* the heirs of the ranch; pretended to hold as a squatter and sold one-half his wife's interest to squatters in possession.

Ward desired Davis to continue in the management of the estate,

because he could then do less injury than he did do by the course he pursued after retiring.

Davis proposed to Ward to defraud the devisees and share it between them, but he indignantly repudiated it, and told Juana, Juan José, and José Ramon. This was in 1853, when Davis was acting as executor; not in 1858. For detected dishonesty Davis more than once received personal chastisement. Had it not been for Ward's vigilant watch Davis would have succeed in defrauding and despoiling the devisees of their estate.

(Here follows denials of allegations, line 54, page 4, complaint to line 7, page 5.)

Admit that in 1858 Juano was between 50 and 60 years of age, but deny that she was not informed as to the situation of her
374 estate and children, but aver she was fully informed.

(Here follows denials of averments on page 5 of complaint, lines 8 to 34, and averments contradictory of those in the complaint.)

Denies the confirmation of title to San Leandro rancho was in July, 1859, and avers the mandate was not filed till February 16, 1859.

Deny that prior to 15 December, 1858, 1,200 acres of San Leandro ranch had been disposed of, and alleges that 1,433 acres had been disposed of, leaving 5,396.58 acres.

(Here follows denial of averment on page 5 complaint, page- 41–48.)

Avers that the unsold land is worth more than $500,000.

Avers that at that time the lands were largely incumbered; solvent debts due estate were only $12,000; no personal property left; rental income, $10,581.16; balance of property could not have been sold for $100,000.

Admit execution of Exhibit A, annexed to the complaint, but deny that the same was induced or procured by fraudulent
375 statements of Ward.

Admit Ward did not execute it, as — advised it was not necessary.

Aver that Ward acted *bona fide* under that instrument; that Jesus Maria and Magdalena's names were omitted because of infancy, and Davis and wife because he declared his intention to ruin the family.

(Here follow- denial of allegation, lines 13 to 17, page 6, of complaint.)

(Here follow- denial of allegation, lines 22 to 36, page 6, of complaint.)

Admits that Magdalena did execute and deliver such an instrument to Ward, but denies any fraud, and that she understood it, and Ward proceeded to act under it *bona fide*.

Sets forth at length the circumstances under which the deed Exhibit A, annexed to complaint, was made.

(Here follows denial of allegations, lines 42 to 53 of page 6, complaint.)

Sets forth that the consideration, $15,000, in deed Jesus Maria to Ward has never been paid, and Jesus Maria still has an un-
376 divided interest, to extent of 150 acres.

Sets forth the circumstances under which the deed of town lots in San Leandro, October 30th, 1867, Ward to Jesus Maria, was made, viz: to sell and convey lots during Ward's absence.

Deny that, December 2d, 1861, the plaintiffs, Magdalena and John Nugent made a deed to Ward of some purport, as deed of trust of December 15, 1858, at the instance or request of Ward, but at that of John Nugent.

Avers that Ward acted *bona fide* under provisions of said deed, and conferred with Magdalena and her husband in relation to matters of consequence thereunder, and she was advised of and fully satisfied with his action.

(Here follows denials of the allegations in complaint, line 9, page 7, to line 44, page 8.)

Set forth at length the circumstances under which the deed, Exhibit B, annexed to complaint (Juana M. Estudillo to Con-
377 cepcion Ward), was made, viz: to protect said Juana from being importuned to sell, and that no fraud was used.

Avers that in all transactions between Juana and Ward and wife said deed, Exhibit B, was regarded as never having been made.

Avers that the purchase price of the Santa Barbara ranchos was $54,062.50.

(Here follows denial of the allegations of complaint, page 9, line 37, to page 10, line 25.)

Avers that the ranchos in Santa Barbara county were purchased in compliance with Juana's wishes to provide for her sons, José Antonio, José Ramon, José Vicente, and Luis.

The Hibernia Savings and Loan Society were to sell and convey the said ranchos to said Juana for the sum of $54,062.50—$27,000 payable September 1st, 1865, and $27,062.50 on September 1, 1862; $50,000 of purchase price to bear interest at 1¼ per cent. per month from March 14, 1863, to September 1, 1863, and thereafter
378 the whole amount to bear interest at same rate. To secure payment a mortgage was made by said Juana and Ward, as trustee, and Ward and wife upon the purchased property, the San Leandro rancho and the El Pinole rancho.

That it was well understood that although the deed to said Juana was absolute in form, yet the purchase was for the benefit of her said sons, and she had no beneficial interest therein, and was merely to retain the legal title until her sons could sell and convey their interests in San Leandro rancho, and with the proceeds pay the purchase price of the Santa Barbara ranchos. The purchase price has not been paid, the only payments being of accruing interest, and of the interest thus paid only $2,348.83, September 16th, 1863, and 1,130.83 on October 11th, 1863, and taxes for 1863–4, and the

expenses of the deed were paid out of the trust property; all other payments and sums expended on said ranchos were
379 the money of John B. Ward, but, owing to this transaction, having been consolidated and mingled with other money transactions with Hibernia S. & L. Society, defendants are unable to state the precise amount said Ward has paid out of his own funds on account of interest on purchase price of said property, but believe it to be about $23,000.

That Ward has expended in stocking, &c., said ranchos of his own money the sum of $50,000; that there is now property thereon, together with that taken possession of by the receiver, amounting to about $60,000, all of which belonged to Ward and not to the trust estate or plaintiffs.

Admits that prior to January 23, 1861, Ward did borrow moneys, and his deceased wife and himself from 1852 joined in a mortgage on her interest in San Leandro, which was foreclosed; amount due August 1, 1861, was about $18,193; said moneys were borrowed
380 prior to the loan from Spear, which loans were paid off with the money borrowed of him and the indebtedness consolidated.

The moneys were partly expended for the benefit of the estate of San Leandro. At the time of the redemption of Concepcion's interest the estate was indebted to Ward for moneys advanced and services rendered far exceeding the redemption money and the sum required to satisfy Spear's judgment; that when Ward and wife united in mortgage to Hibernia S. & L. Society to secure the purchase-money of raid ranchos the time for redemption of Concepcion's interest in San Leandro had not expired and was redeemed prior to the last-named time.

(Here follows denials of allegations in complaint, page 10, line 41, to page 11, line 6.)

Deny that Ward ever in any way sought to acquire any of plaintiffs' property for himself.

Aver that plaintiffs' interest has only been preserved by
381 Ward's efforts; had he withdrawn they would be penniless and homeless; that grave embarrassments occurred in the management of the estate, not through Ward, but by inattention and neglect of plaintiffs.

(Here follow denials of the allegations in complaint, lines 6 to 37.)

Aver that though El Pinole interest was included in mortgage to secure payment of the Santa Barbara ranchos it was understood at the time of the Pinole exchange that neither said Pinole nor said sons *was* to pay any of the money secured, and never did pay any, and said rancho was subsequently released from said mortgage.

Aver that for nearly three years thereafter in pursuance of the arrangement José Ramon, José Vicente, and Luis D. carried on farming on El Pinole, but were unsuccessful and involved, and it was expedient and they were desirous of disposing of their interests

therein, and negotiations were going on between John and
382 Patrick Touney and said three sons for the purchase and sale of El. Pinole during the winter of 1866–'7; that the deed of January 30, 1867, was made simply for the accommodation of the 3 sons; that he should convey to Touney if the title was satisfactory; that Ward and said three sons all joined in deed on February 6, 1867, to Touney, because counsel advised it, Ward having no interest in the property; that if deed of April 6, 1866, had be[en] recollected that of January 6, 1867, would have been unnecessary.

(Here follows denials of allegations in complaint, page 11, line 37–49.)

Admit that Ward received the purchase-money, $42,500, as agent and creditor of said 3 sons, and subject to their draft; that at the time of sale to Touneys El Pinole was released from mortgages of March, 1863, and April 11, 1866, given to cover 1st mortgage and additional amounts, and about $20,000 of Ward's money was at that time paid upon said mortgage.

383 Avers that of the purchase-money of El. Pinole $24,333.54 was applied by Ward, with consent of José Ramon, José Vicente, and Luis D., to payment of certain indebtedness, and the balance paid to them in their just proportions.

(Here follow denials of the allegations in the complaint, page 11, line 51, to page 12, line 18.)

Deny that on April 23, 1864, José Antonio in terms conveyed his interest in San Leandro lands to Juana, his mother.

Aver said conveyance was *bona fide;* $10,000 was real consideration.

Deny that the conveyance was upon trust, but was absolute.

(Denial of allegations, lines 34–42, page 12, of complaint.)

Avers that both José Antonio and Juana well knew the facts of the said conveyance; that the allegations in the complaint in regard to this transaction are imaginary and unfounded.

384 Deny that any conveyance was fraudulently procured from Juana prior or subsequent to August, 1864, or ever.

Deny that on that day she was owner of an undivided ½ and 3 undivided 18ths of San Leandro lands unsold, but aver she held legal title to $\frac{1}{18}$*ths* thereof unsold.

Deny that on that day she had any beneficial interest in ranchos Guadalupe, Cosmolia, and Punta de la Concepcion, except as herein stated.

(Here follow denials of allegations in complaint, page 12, line 51, to page 13, line 15.)

Aver that on August 16, 1864, and long prior, and for two years thereafter, 3 Santa Barbara ranchos were not worth more than $4,500. Ward tried to sell at a loss of $15,000, but could not. The value of any fractional interest was corresponding.

Deny that cash value of $\frac{1}{18}$ San Leandro on that day was $250,000;

aver unsold portion (free from incumbrances) was not more
385 than $106,335.19, with clear title.

Deny that Juana's interest in San Leandro was only subject to indebtedness [of] $52,000.

Deny that she had any interest in the Santa Barbara ranchos.

Deny that the annual rents of undivided $\frac{2}{3}$ of San Leandro were then producing into Ward's hands *were* not less than $16,000.

Aver that the rents for the whole rancho were only $13,888.50.

Admit that Santa Barbara ranchos were at that time producing any income, but deny they were rising in price or offered immediate prospect of increase in value; did not increase for two years after 1864.

The true date of marriage of defendant Dolores with Cushing was August 15, 1864.

Admits all the members of the family were present at the house occupied by Juana except José Ramon and the wife of Davis.

Deny that the family left immediately after the marriage.
386 They remained several days, except Cushing and wife.

Deny that Ward did not communicate his intention of purchasing the trust property to any member of the family or only did so then; on the contrary, he had done so months prior to August, 1864, and they had discussed the subject.

Deny that in August, 1864, and long prior, was trustee of the lands mentioned in complaint for plaintiffs except Magdalena; and except as to her the trust had ceased and determined, and ceased as to her except as hereinafter stated.

Deny that Ward took conveyance in Juana's name without her knowledge, or that August 16, 1864, she was not really the owner of the interest in San Leandro she thereby conveyed or that she owned Guadalupe, Cosmolia, and Concepcion ranchos, except as before stated; admit Ward knew effect of deed, but denies any concealment, and deny that plaintiffs have not known of the
387 effect of deed until within past 8 months, &c., but aver that Juana and the other plaintiffs well knew of the effect of the deed and all circumstances connected therewith long prior to its execution and had discussed it.

Deny that Ward had exclusive control of said property for six years, or near six years, or that he never offered to render or rendered any account to plaintiffs, or give any information of what he had done with the property, or that on August 16th, 1864, Juana or the other plaintiffs was uninformed of its condition or that they only received small amounts of money from him from time to time as he chose to furnish them on application.

Avers that Ward has always since he has been connected with the lands deferred to plaintiffs' wishes and consulted them and kept them informed. Statements of rents and profits, &c., of the lands were made, and plaintiffs, especially Juana, were at all
388 times duly informed of its conditions, of which she on August 16, 1864, and at all times was well aware.

The defendant never limited the moneys received by plaintiffs. The adult children, except wife of Davis, lived and spent money as

they pleased of Ward when he had it, and, when he had none, running in debt, which he was compelled to pay. The minors were furnished with the moneys required.

The adult children compelled Ward to pay more than the estate warranted, but, in the condition of the estate, hostile parties would have bought the claims and ruined the estate.

They made losses in business through neglect, &c.

Admit sales under trust deed of San Leandro lands between December 15, 1858, and August 16, 1864, but Ward did not fix the prices.

Avers that sales were made for best prices with consent of
389 adult plaintiffs, who joined in deeds.

Deny that plaintiffs were not informed of the amounts of the sales and that Ward received $500,000 previous [to] August 16, 1864; admits that Ward received $211,106.68.

(Deny the allegations in complaint, page 14, line- 24–33.)

Avers that Ward informed Juana that the indebtedness was $115,529.04.

(Here follows denial of allegations in complaint, page 14, lines 34–53.)

Admit that Ward agreed to pay Juana $80,000 for said conveyance, but not in cash. The deed contained the usual receipt for the consideration; $8,000 was paid down by conveying to her certain property; additional $11,042.53 has been paid, and the balance offered and declined; deny the account of the transaction given in the complaint.

Admit that the promissory notes mentioned in complaint represented the $80,000, but deny —. Defendants aver that N.
390 Hamilton, county judge, Alameda county, read and explained said notes to Juana in Ward's absence.

(Here follows denial of allegation in complaint, page 23, line- 4–20.)

Aver that Juana took and since kept said notes.

Deny statement on page 15 of complaint, lines 34–42; aver notes bore interest, and that he paid $8,000 and $11,042.53, and offered the balance, which was refused, as she had no use then for the money, as she was supported by Ward.

Deny the averments in complaint, page 15, line 43–54; aver that Ward paid full consideration and more than any one else would.

Deny that annual income was $20,000; aver it was $13,888.50.

Deny that Ward was since indebted to Juana, but the contrary was the case for services and advances.

Deny that incumbrances were placed on the property fraudulently; avers that they were placed there for the sole benefit of devisees.

391 Deny that Juana never got the notes, but since delivery she has always had them.

Admit the notes were not negotiable, as that was agreed upon, but

den*ies* that they were valueless, and aver*s* that they were worth their face value.

(Den*ies* allegations in complaint, page 16, line- 8–23.)

Aver*s* that Juana paid close attention to the deed, notes, and said transaction, and discussed same with the family and fully understood it.

The answer then at length gives the history of the deed of August 16, 1864, from Juana to Ward, and the so-called Pinole exchange, which was a compromise by which José Ramon, José Vicente, and Luis got the Pinole interests in exchange for their San Leandro interest to be conveyed to Juana, who was to convey to Ward the three Santa Barbara ranchos. The other children were to convey their interests to Juana for a consideration of $15,000 each in San Leandro.

392 That Ward was to execute to Juana his notes, ten in number, at 1, 2, 3, &c., year-, $8,000, to bear interest after maturity, in payment for San Leandro ranch, and Ward to release all claims for services, money advanced, &c.

José Antonio demanded $10,000 in *corn* and got it, Ward assuming his payment. The $\frac{1}{11}$ of Pinole, which Antonio would not take on March 31, 1864, Juana conveyed [to] José Ramon, José Vicente, and Luis, hey giving their note and mortgage for $10,000.

Aver*s* that Juana and sons were fully cognizant of this transaction by investigation, &c., after said settlement, with full and perfect knowledge, and after settlement of their accounts with Ward as trustee and attorney-in-fact discharged him, as follows:

SAN LEANDRO, *March* 31, 1864.

We, the undersigned, having this day, by deed of even date herewith, disposed of our interest in the rancho of San Leandro, hereby certify that all accounts and business with John B. Ward
393 arising from our connection with us as our trustee and attorney-in-fact are hereby settled and concluded.

JOSÉ R. ESTUDILLO.
JOSÉ VICENTE ESTUDILLO.
LUIS D. ESTUDILLO.

Aver that defendant is thereby discharged.

The answer then sets out what had been done under the compromise.

That the conveyance — Juana to Ward and the Pinole exchange were all parts of the same transaction, although papers not executed at same time, and relates again all that took place with regard to the 9 promissory notes.

That Magdalena Dolores Cushing and Jesus M. Estudillo have elected to take 150 acres in lieu of $15,000, and Ward has conveyed 50 acres to Dolores and holds remaining 100 acres of hers, accounting to her for it; also holds shares of Magdalena and José María in trust; that Magdalena, Jesus Maria, and Dolores have
394 never rescinded the agreement, except so far as this suit is concerned, on the part of Magdalena.

It was understood and agreed and was one of the principal considerations for the Pinole exchange, the purchase and sale of San Leandro & the Santa Barbara ranchos, that all trusts should be at an end and each should hold separately, and was a final adjustment.

That in said adjustment the deed (Ex. B.) Juana to Concepcion Ward was not considered as in existence.

That settlement was final and satisfactory, and — knew of no charge of fraud until served with complaint herein; always been mentioned with approval, especially by Juana.

Avers that in 1867 Juana agreed with Ward, for 4,000 acres in Guadalupe, to pay him in his notes, and — sale would have been consummated but for the machinations of Nugent.

That by said settlement Ward received from Juana, by her
395 deed, August 16, 1864, free and clear of all trusts, the premises conveyed.

Admits that Ward never reconveyed to Juana the estate conveyed by her to his wife, and avers that by the settlement it became unnecessary.

(Here follows denial of allegation in complaint, line- 24–36, page 16.)

Avers that the conveyance of Juana to Concepcion was forgotten until discovered by Boyd, attorney for Ward, by whose advise Ward and wife conveyed to Cushing and the latter to Ward, prior to which the title had all vested in Ward.

(Here follows denials of allegations from line 37, page 16, of complaint to line 22, page 17.)

Avers that deed Exhibit G, annexed to complaint, was given to Felton for services, and it was part of the 150 acres to which Dolores was entitled. Both parcels were only worth $8,000.

(Here follows denial of allegations of complaint, line- 31–46, page 17.)

Avers that Lacoste purchased rancho Puenta de la Con-
396 cepcion for value, received deed, and entered into possession; also that there was an agreement for Ward to repurchase on terms set out in answer.

(Here follow denials of allegations, line 47, page 17, of complaint to line 15, page 18.)

Aver that Nugent and other plaintiffs have conspired to bring this action to extort money from Ward; aver that although facts were well known no steps have been taken or objection made until Nugent was refused further supplies of money, his demands having become so extravagant as to render it impossible to comply therewith.

Deny that Ward has conveyed to all or any of the defendants or to deceased Concepcion in trust for himself or otherwise any portion of the trust property, except as herein stated and such portions

thereof as were from time to time sold absolutely in good faith to third persons; all conveyances were duly acknowledged, so as
397 to entitle them to be recorded, and verily believes they were recorded; deny that Ward ever made or executed, or thought of ever making or executing, any deed or instrument in favor of any one for — purpose — concealing knowledge thereof from plaintiffs, or for the purpose of depriving them of any of their pretended rights in or to the property, real or personal, described in the complaint or any part thereof; that his acts have been open to the closest scrutiny, and deny that defendants have in any manner attempted to deprive plaintiffs of or injuriously affect the plaintiffs in the property described in the complaint.

Deny that Ward is insolvent or unable to respond to any judgment against him; aver that he is worth, real and personal property, above his debts and liabilities, $150,000.

(Here follows denials of averments, lines 33–38, page 18, of complaint.)

Avers that prior and since 1852 Ward engaged in business
398 pursuits; that from 1852 he devoted a great deal of time and attention to plaintiffs' affairs; that for about 10 years prior to August 16, 1864, he gave his whole time, energies, and talents to the managements of said estate and interests; expended large amounts of money at urgent request of plaintiffs, and in pursuance of this object did abandon all other business.

(Here follows denial of allegations, lines 39–43, page 18, of complaint.)

Aver that Ward is worth property outside of pretended trust property, $70,000.

(Here follow denials of allegations, line 45, page 18, to line 1, page 19, of complaint.)

Admits Ward gave no security for the performance of his duties; aver he performed them faithfully to satisfaction of plaintiffs; that the trusts were determined August 16, 1864, except that Ward is bound to convey to Magdelena 150 acres, and to account to her for the income thereof.

399 Deny that the trust deed, or any part thereof, will be lost to plaintiffs pending this suit.

(Here follows denials of allegations of the complaint, line- 7–14, page 19.)

Admit that at time of the commencement of this action that there was on deposit in bank of Donahue, Kelly & Co. about $7,035.59, but it was Ward's money; did not belong to plaintiffs or proceed from their estate; deny that same or any part thereof ought to be paid over to plaintiffs, or to a receiver for their benefit.

Admit that if Ward had not been restrained by order of judge of 12th district court he would have used said money in the *cause* of his business, as was his right, but deny that the moneys would thereby be lost to plaintiffs, or that he ought to be restrained.

(Here follows denials of the allegations, line- 29–35, page 19, of complaint.)

Admit there is in Bank of Hibernia Savings and Loan Society $3,000 on special deposit for payment of taxes on money bor-
400 rowed by Ward, but is not under his control or subject to his draft.

Also there is $2,666.70 special deposit guaranty for purchase and payment to defendant Lacoste for said Punta de la Concepcion rancho agreeably to the contract, but it is not subject to Ward's draft or under his control.

Deny that said sums are moneys of plaintiffs, or that they are entitled thereto, or that they ought to be paid to them or a receiver for their benefit, or that Ward would withdraw them if not restrained unless the same were released from special deposit, or that same would be lost to plaintiffs, or that Ward should be restrained.

(Here follows denials, line 50, page 19, to line 7, page 20, of complaint.)

In relation to the matters and things alleged on page 20, line 8 to 47, the answer at length sets forth the dealings Ward has had with them, and shows that they have no property of Ward's ex-
401 cept Cushing, who is his partner in farming, and Rottee and I. W. Madison, who are lessees respectively of the Estudillo house and the bar therein.

The answer then enumerates the leases made by Ward, but deny that unless Ward be restrained said rents will be lost to plaintiffs, or that said rents are plaintiffs' moneys, or that they ought to receive them, or that Ward should not receive them, or that a receiver ought to be appointed.

(Here follows denials of allegations of complaint, line 43, page 20, to line 3, page 21.)

Aver that said books, papers, &c., are Ward's exclusive property, kept for the management of his own affairs, and, although they contained *any* matters purely personal to Ward and foreign to alleged trust, were open to inspection of plaintiffs.

Deny that application has been made to Ward to account or that he refused.

402 Avers his accounting and discharge of trust, except as to Magdalena, and the only demand made was by John Nugent, not to account, but to give him one-half of the property, which was refused.

Deny that Ward pretends that he is not bound to account, and allegev that he is not bound to do so.

Deny that on an accounting anything would be found due from Ward to plaintiffs, but that Nugent would be found to owe Ward $15,000, about, for moneys advanced. Defendants except from said statement the balance due by Ward to Juana on said notes; to José Antonio balance of purchase-money, and to Magdalena in reference to 150 acres of land in San Leandro.

(Here follow denials of allegations, lines 15–20, page 20, of complaint.)

Avers that death since commencement of this action (July 29, 1868) of Concepcion A. Ward, devisee of José Joaquin, leaving
403 issue; that she was devisee of $\frac{1}{18}$th San Leandro rancho; that she left will bequeathing one-third of real and personal property to her husband and two-thirds to him in trust for her children, and that will was admitted to probate, &c.

That José Ramon, José Vincente, and Luis D. should not maintain this action, because in 1864 they conveyed the San Leandro lands to Juana M. for the consideration of a conveyance by her to them of her interest in El Pinole, into possession of which they entered and continued until 1867.

That they then sold and conveyed to John and Patrick Tormey for $45,000, by means whereof said Tormeys are seized in fee of said interest in El Pinole; that said Tormeys are not parties to this suit.

That said José Ramon, Vicente, and Luis D. did not return or offer to return to Juana the consideration she paid them nor offer to re-cind the sale, but have disabled themselves from returning
404 the consideration to said Tormeys.

They have not offered to return the consideration paid by said Tormeys or re-cind the sale.

That they did not own any interest in the lands described in the complaint, except the San Leandro and El Pinole lands.

That José Antonio should not maintain his action because he was never seized or entitled to any lands described in the complaint, except San Leandro lands.

That in 1864 he sold to Juana M. all his interest for $10,000—a full consideration.

That he received and retained said consideration and never offered to re-cind the sale.

Further answering, that since the American dominion was first established in California real estate has been very fluctuating in value from various cause-, and prompt assertion and defense of rights essential for justice.

405 That all the purchases and conveyances set out in complaint were done openly, to knowledge of plaintiffs, and all interested acted thereunder to the plaintiffs' knowledge; that instruments were recorded and open to inspection; that they were fairly done and fair consideration paid, and plaintiffs did not dissent.

That Ward, in developing the property, laid out $50,000 and incurred $40,000 liabilities, to the knowledge of plaintiffs, for which consideration they should not maintain their action.

That they have not asserted their rights with due diligence, and their allowance would be contrary to equity and a hardship on Ward.

Further and Separate Defenses.

No cause of action has accrued within 3 years before commencement of action.

The facts constituting the cause of action were known to plaintiffs more than three years before commencement of action.

406 No cause of action has accrued within 4 years before commencement of action, and plaintiffs well knew the facts constituting the pretended or supposed frauds more than three years before the commencement of this action and more than three years have elapsed since they discovered them.

Defendants aver supposed cause of action accrued more than five years next preceding the commencement of this action.

Defendants aver that the supposed frauds and the facts constituting them were known to plaintiffs more than three years next preceding commencement of this action and no cause has accrued within 3 years.

Similar averments as last as to 4 years.

Wherefore these defendants pray judgment in their favor, with costs, &c.

Dated this 6 day of January, A. D. 1870.

McALLISTER & BERGIN,
J. P. HOGE, AND
McCULLOUGH & BOYD,
Attorneys for Above-named Defendants.

407 Verified by affidavit of John B. Ward and Chas. H. Cushing. Sworn to January 6, 1870.

(Endorsed:) Service of a copy of the within answer is hereby admitted this 6th day of January, A. D. 1870. Wm. H. Patterson, att'ys for pl'ff. Filed January 6th, 1870. J. A. Amerman, clerk, by E. C. Root, deputy.

The foregoing answer was also adopted by the defendants, Juana Sophia Ward and John Francis Ward, as their answer, and was filed as such January 6th, 1870.

408 RESPONDENT'S EXHIBIT 17.

SATURDAY MORNING, *November* 19, 1870.

Court met pursuant to adjournment. Present: Same judge and officers as heretofore.

JUANA M. ESTUDILLO *et als.*
vs.
JOHN B. WARD *et als.* } No. 2079.

On reading and filing notice of motion and the papers therein referred to, and due proof of service of said notice on all the attorneys for defendants, and after hearing Felton for pl'ff and H. R. W. Clark, Esq., for defendants, Davis and wife—

Ordered, That pl'ffs have leave to dismiss this action, and that upon filing the notice of dismissal heretofore served the clerk enter a judgment of dismissal and discontinuance in this action, with the costs of defendants against plaintiffs. It is further ordered

that said receiver turn over and surrender to pl'ffs or their
409 trustee, Theodore Le Roy, all and singular the property held by him as receiver, and that the sureties upon the bond of said receiver be discharged from all liability thereon.

S. B. McKEE,
Dist. Judge.

STATE OF CALIFORNIA, } ss:
County of Alameda, }

I, G. E. Smith, county clerk of county and *ex-officio* clerk of the district, county, and probate courts in and for said county, hereby certify that the above and foregoing is a full, true, and correct copy of the original minutes, district court, 3d dist., regarding dismissal of cause and discharge of receiver's sureties in the aforesaid entitled cause as the same now remains of record and on file in the office of said 3d dist. court.

Witness my hand, with the seal of said court affixed, at San Leandro, this ninth day of Sept'r, A. D. 1871.

[SEAL.] G. E. SMITH, *County Clerk, etc.*,
By A. W. COLLINS,
Deputy Clerk.

410 RESPONDENT'S EXHIBIT 18.

In the District Court of the Twelfth Judicial District of the State of California in and for the City and County of San Francisco.

JUANA M. ESTUDILLO, JOSÉ RAMON ESTUDILLO, JOSÉ ANTONIO ESTUDILLO, José Vicente Estudillo, Luis D. Estudillo, Magdalena Estudillo Nugent (Wife of John Nugent), John Nugent (Husband of said Magdalena), Plaintiffs,

vs.

JOHN B. WARD, SOPHIA WARD, and JOHN WARD, Children and Heirs of said Concepcion A. Estudillo Ward (Wife of said John B. Ward), Dolores Estudillo Cushing (Wife of Charles H. Cushing), Charles H. Cushing (Husband of said Dolores), and Jean Francisco Le Coste, Wm. H. Davis, Maria J. Davis, his Wife; Jesus Maria Estudillo, Defendants.

The said plaintiffs, by leave of the court and pursuant
411 to its order for this amended complaint, complain of the said defendants and aver, and the fact is, that in the year 1852 and on the 7th day of June one José Joaquin Estudillo departed this life in the then county of Contra Costa (now county of Alameda), in this State, of which said county of Contra Costa the said José Joaquin was, at the time of his death, a resident.

That at the time of his death the said José Joaquin left his last will and testament, executed by him in due form of law, and that after his death, to wit, on the 27th day of September, 1852, the said last will was duly admitted to probate by an order and judgment of the probate court of the said county of Contra Costa, by said court duly given, made, and entered upon its records; that said probate

court, at the time of making and entering said order and judg-
412 ment, — lawful jurisdiction and authority to admit said will to probate.

That the said order and judgment of probate thereof has never been revoked or reversed, or otherwise vacated or set aside.

That in and by the terms of the said will one William H. Davis and the plaintiff, José Ramon Estudillo, were appointed executors thereof; that said William H. Davis and José Ramon — qualified as such executors in said probate court of Contra Costa county.

That in the year 1853, and while said executors were acting as such, that portion of the county of Contra Costa in which the said José Joaquin Estudillo resided at the time of the death, and in which the rancho San Leandro hereinafter mentioned was situate, became a portion of the territory of which the present county of Alameda was formed, and that the proceedings of said executors about said estate were thereafter conducted in the probate
413 court of the said county of Alameda, to which said last-named court the said proceedings about the administration of said estate of said José Joaquin Estudillo, deceased, had been regularly transferred, and in which said last-mentioned court said proceedings were after such transfer regularly continued by said executors until the sixth day of July, 1854, on which last-mentioned day, the said estate having been fully administered by said executors under said will, the said probate court of said county of Alameda duly made and entered in its records an order and judgment whereby said court adjudged and determined that said estate of said José Joaquin had been duly administered under the said will, and that the administration thereof was and should be, and the same was thereby, closed, and that the said executors should be, and they were thereby, finally discharged; that the said probate court of the said
414 county of Alameda had lawful jurisdiction and authority to make said order and judgment, and the said order and judgment have since remained in full force and not vacated, reversed, or set aside.

That at the time of his decease the said José Joaquin, among other property that he owned, was seized in fee, as of his separate estate, of a certain tract of land, situate in the then county of Contra Costa (now county of Alameda), called "San Leandro" or "Rancho San Leandro," of the superficial extent of one and three-quarters of a league square, and which said rancho had been granted to him, the said José Joaquin, by a grant made by the governor of the former department of California under the colonization laws of Mexico, and that by the terms of said will said José Joaquin devised in fee to the plaintiff, Juana M. Estudillo, who was his widow,
415 the edifice or house situate upon said rancho San Leandro, in which he resided, and the furniture therein, and also the equal undivided one-half of the said rancho San Leandro, to the plaintiffs, José Ramon, José Antonio, José Vicente, Luis D. Magdalena, and to the defendants, Concepcion and Dolores, and to Maria J. Estudillo and Jesus Maria Estudillo (which last-named nine persons were his children and heirs-at-law), each the undivided one-

eighteenth part of said rancho San Leandro, except the said dwell-house so devised to said plaintiff Juana M.

That said Joaquin was not seized of any real estate at the time of his death, but was at that time possessed as owner of a large quantity of personal property then being upon the said rancho San Leandro, and which consisted of three thousand head of horned cattle, four hundred head of sheep, and about fifty head of horses, one-half of which said personal property he bequeathed by his said will
416 to said plaintiff Juana and the other half to his said nine children and heirs-at-law aforesaid, to be held by them, the said children, share and share alike, in *in* equal proportions, except that said José Joaquin, by his said will, made to said plaintiff José Ramon a special bequest of forty head of horned cattle.

That at the time of his death said José Joaquin was not indebted in any wise except to the extent of a few trifling debts, for the payment of which he provided in his said will, and that, when his said estate had been fully administered and the executors of his will had been discharged as aforesaid by said probate court of Alameda county, the personal property aforesaid had not been but little, if at all, diminished in quantity or number, and no part of the rancho San Leandro had been alienated.

That said rancho San Leandro contained seven thousand
417 and ten $\frac{84}{100}$ acres, and is bounded and described as follows: On the northerly side by the creek of San Leandro, on the easterly side by the rancho of Guillermo Castro, commonly called "rancho of San Lorenzo," on the westerly side by the Bay of San Francisco, and on the southerly side by the creek of San Lorenzo.

That in the year 1847 the said Maria J. Estudillo intermarried with said William H. Davis (one of the executors of said will), whose wife she now is.

That on the 4th day of February, 1852, the defendant, John B. Ward, intermarried with the said defendant, Maria Concepcion Estudillo (the eldest child of said José Joaquin), and is now the husband of said Maria Concepcion; that since the filing of the original complaint in this action the said Maria Co-ception departed this life, leaving her surviving the said John B. Ward and two children, viz., Sophia Ward and John Ward.

That on the 27th day of August, 1861, the plaintiff, Mag-
418 dalena, was married to the plaintiff, John Nugent, and is now his wife.

That on the 15th day of August, 1864, the said defendant, Dolores Estudillo, was married to the defendant, Charles H. Cushing, and is now his wife.

That the plaintiff, Juana M. Estudillo, widow of the said José Joaquin, deceased, is a daughter of Ygnocio Martinez (who was formerly a military commandante in California), and who, in the year 1842, became the grantee and owner of the rancho or tract of land situate in the now county of Contra Costa called "El Pinole," and of the superficial extent of about four leagues; and at the time of the death of said Ygnocio, which occurred in the year 1848, the said Juana M., as one of his heirs-at-law, inherited from him a con-

siderable portion of said rancho, and subsequently she acquired other interests in said rancho El Pinole, so that she became the owner as of her separate estate of about seven thousand acres
419 of said rancho El Pinole, which was her separate estate and in no wise connected with the estate devised to her by the will of her said husband, José Joaquin.

That after the executors were discharged from the further administration of the said estate of said José Joaquin the interest of the devisees and legatees in said real and personal property devised and bequeathed by said will as aforesaid remained in common and undivided and was managed and controlled by said William H. Davis and said defendant, John B. Ward, until the — day of April, 1858, at which time said Davis retired from the management and control thereof and left the same under the sole control of and management of said defendant, John B. Ward.

That at the time said Davis retired from the management of said property as last aforesaid the said estate was but little indebted and said property was unincumbered, except to the extent of
420 $14,000, and a larger sum than $20,000 was due from solvent debtors to said estate, which was afterwards collected by defendant Ward.

That the said devisees and legatees had been supported upon the rents and profits of said lands and the increase of the personal property which they derived under the said will.

That after said Davis ceased to participate in the management of said property as aforesaid the said John B. Ward managed the same, professedly for the general benefit of all the devisees and legatees in said will for about eight months, and until the 15th day of December, 1858, when he obtained the deed of trust hereinafter set forth.

That during said eight months said defendant, John B. Ward, borrowed money to the amount of $5,000, and at his instance all the devisees under the said will (except plaintiff Magdalena and the said Jesus Maria, who were infants and under lawful
421 age) united in a mortgage upon the lands of said rancho San Leandro to the lender of said $5,000 (one Martin Murphy) to secure its payment; that said $5,000 was borrowed by defendant Ward during said eight months, and the said $5,000 was borrowed by him for his own private matters, and none of said devisees got any of the benefit thereof.

That the plaintiff, Juana M. Estudillo, is and was, and all her children are and were, always unused to the transaction of business and to the selling or buying or dealing with landed property; that some of her said children were under lawful age, and all of them inexperienced in the transaction of business in the year 1858, and were not well versed or learned in the English language.

That after the said William H. Davis ceased to manage their affairs they all looked to the said defendant, John B. Ward,
422 to do so, and placed implicit faith and reliance in him and in his good intentions and purposes as a relative and his his good management as a man of business of their affairs.

That the said defendant, John B. Ward, is and was at said time a shrewd and active business man, and well versed in business transactions, and speaking both the English and Spanish language- with great fluency and ease.

That said widow and children placed in the year 1858, and up to within eight months last past, the most implicit reliance and trust in the honor and honesty and in the general correctness of life and habits of said defendant, John B. Ward, and did not hesitate to surrender to him, during all said time, the absolute management of their property without question or suspicion on their part.

That after said Davis ceased to participate in the manage-
423 ment of said property the said defendant, John B. Ward, assumed to control the entire family of the said José Joaquin, except the said Maria J., wife of said Wm. H. Davis; that he habitually dictated and determined for them what should or should not be done in relation to the management of their property, their education, expenditures, and generally controlled them and their property; that his control was submitted to and not resisted because his motives and purposes were supposed by the family to be good, and such as they should have naturally been in a son-in-law and brother-in-law representing the interests of the family of which his own wife was the eldest child.

That the said defendant Concepcion was the eldest daughter of said plaintiff, Juana M., and that through and by means of said Concepcion, as well as by artful management otherwise, the said defendant, John B. Ward (who up to within two months last
424 past lived in the same house with the plaintiff, Juana M.), obtained complete influence and control over said plaintiff, Juana M., insomuch that she implicitly followed his directions and complied with his requests in all respects concerning the conveying, mortgaging, buying, and dealing generally with her property and that of her children; that said plaintiff, Juana M., believing as she did in the said defendant Ward's honesty of purpose and fidelity, encouraged by her conduct her children to *to* trust him also implicitly, and the said defendant, John B. Ward, professed the greatest friendship and love for all the members of the said family and professed and declared to them that he desired only to serve their interests and to manage their property for their welfare.

That the plaintiffs are now informed and believe, and upon such belief and information they aver, that before said defendant
425 Ward succeeded to the sole control of their property as aforesaid he had formed the deliberate, secret design of cheating them out of it altogether and acquiring it for himself; that for a considerable period of time before said William H. Davis retired from the management of their affairs (which he was at one time conducting jointly with said defendant Ward), as aforesaid, the said defendant Ward was exceedingly anxious to displace the said Davis from any participation therein; that in order to obtain the removal of said Davis therefrom he privately and, as the plaintiffs now believe, unjustly accused the said Davis to the plaintiffs of entertaining a design to sacrifice the interests of the plaintiffs for his (said

Davis') own benefit; that the defendant Ward represented to the plaintiffs, among other reasons why said Davis was not to be trusted by the plaintiffs, that he (Davis) had actually proposed to him (the defendant Ward) that the said Davis and said
426 defendant Ward should secretly conspire together for the purpose of depriving the plaintiffs of their said property and dividing it between them, the said Davis and defendant Ward. The plaintiffs believed said statement of said defendant Ward in that behalf to be true when he made it to them, but they are now informed and believe, and upon such information and belief they aver, that it was false, in fact, that said Davis ever made any such a proposal to said defendant Ward, and they aver that said defendant Ward falsely made said representations to the plaintiffs in that behalf in order that said Davis might be displaced from any participation in the management of their affairs, and that he (said defendant Ward) might thereafter be enabled to proceed without the hindrance of said Davis the more readily to defraud the plaintiffs of their said property and appropriate it to himself. That the plaintiffs,
427 acting under the belief they then had in the truth of the said statements of the said defendant Ward in that behalf, did lose confidence in said Davis and in his honesty and just management of their property, and did manifest their want of confidence in said Davis in such a manner that said Davis did, for that reason, retire from and give up all participation in the management of the property of the plaintiffs, and left the same wholly in the hands of said defendant Ward; that said Davis was a skilful man of business and fully competent, and, as the plaintiffs now believe, anxious to protect their interests, and said defendant Ward well knew this to be true, and was desirous to remove said Davis from any participation in the management of the plaintiffs' business in order that he might, with greater facility, despoil the plaintiffs, and prevent them from
428 having any recourse to any adviser or counsellor but himself.

And the plaintiffs further aver, and the fact is, that during the eight months immediately preceding the 15th day of December, 1858, the said defendant, John B. Ward, projected a scheme of having himself appointed to be the sole trustee of the heirs and devisee of José Joaquin, and of having the legal title to the landed property belonging to them vested in himself, in order, as he pretended then, and as these plaintiffs were fraudulently then by him induced to believe to be the truth, that he might more conveniently and expeditiously transact the business affairs of the plaintiffs without the continually recurring necessity of his having to apply to the adult plaintiffs to obtain their signatures to papers or instruments of writing concerning the management of said premises.

That on said 15th day of December, 1858, the plaintiff Juana was between fifty and sixty years of age, and not informed
429 at all as to the details or actual situation of her estate or that of her children; that she had been accustomed after the death of her husband to rely implicit-y upon what was told her by her sons-in-law, said Davis and said defendant Ward; that she did so

not only because of her own personal unfitness to manage property, but especially her want of information concerning American laws, customs, and rules of property. The said Juana M., being a native-born Californian, and having been reared and spent the greater part of her life, and until the American conquest, under the California system of laws, customs, manners, and language, and her confidence that her said sons-in-law, said Davis and said defendant Ward, had the ability and good purpose to take care of her own and her children's property and preserve them from injury in respect thereto;

430 that the plaintiffs, José Ramon, José Antonio, José Vicente, and Luis, were not educated to trade or manage property to a sufficient degree to undertake the conduct of said landed estate, and, besides that, they did not have a sufficient acquaintance with the American laws or language, or the method of doing business in the American courts, to enable them properly to apply such natural ability as they possessed to the taking care of the said landed property of San Leandro, which was then involved in litigation with squatters, and also was being presented for confirmation before the tribunals of the United States in pursuance of the treaty of Guadalupe Hidalgo; that the only remaining son of the plaintiff Juana was Jesus Maria, who was then a boy of about fourteen years of age, and that the remaining children of the plaintiff Juana were females, one of whom, the defendant Concepcion, was the wife of the defendant Ward, and another of whom, Maria J., was married to said

431 William H. Davis, and the two remaining daughters of the plaintiff Juana were the defendant Dolores and the plaintiff Magdalena, who was then under age, and of course unfitted in all respects to attend to the business necessarily growing out of and connected with the management of said estate.

And the plaintiffs further aver, and the fact is, that *neither* estate and title to said lands of San Leandro became finally confirmed to them in the month of July, 1858, subject, however, to an unsettled question of the exterior boundaries thereof.

That before the 15 day of December, 1858, there had been alienated only 1,200 acres of the land of the rancho San Leandro, and there was then remaining to the said devisees of said José Joaquin, of property devised to them under the said will, 5,810 acres of said land (subject to the said incumbrance of $19,000),

432 but there was then owing to the said devisees solvent debts amounting to $20,000 and upwards, for the sale of lands theretofore made by said Davis and said defendant Ward, and there was also remaining a considerable portion of said personal property and said landed property, and personal property then remaining unsold was then worth upwards of two hundred and fifty thousand dollars in United States gold coin and produced $30,000 per annum rent in United States gold coin; that the value of said 5,810 acres is now one and one-quarter millions of dollars and upwards in like coin; that on said last-mentioned day the defendant Ward, in pursuance of a secret design which he had long cherished to get to himself the legal title to said landed estate of San Leandro and so manage the same as to fraudulently deprive

the plaintiffs thereof and to secure it to himself, artfully and
433 fraudulently, and under the false guise of the better enabling
him to manage and control the same for the plaintiffs and the other devisees of said José Joaquin Estudillo, prepared and procured the plaintiffs, Juana M., José Ramon, José Antonio, Jose Vicente, Luis, and the defendant Dolores, to execute and deliver, and they did, on said last-mentioned day, execute and deliver to him, the said defendant, John B. Ward, a certain instrument in writing, a conveyance in trust and letter of attorney, which are hereto annexed, marked "Exhibit A," and made part hereof.

That said instrument was not executed by said defendant, John B. Ward, but he received and proceeded to act under the same and in the pretended discharge of the duties and powers therein conferred upon him; that said defendant Ward omitted therefrom the name of
Maria J. Davis, one of the devisees of said José Joaquin, as a
434 grantor, because he knew that she would not execute the
same, and also omitted the name of the defendant Concepcion, his wife, and also omitted the names of Jesus Maria, another of said devisees, and that of the plaintiff Magdalena, as grantors, because the two last named were then respectively under lawful age and legally incompetent to execute or deliver the same or any similar instrument in writing.

That immediately after receiving and recording said instrument of writing last aforesaid (which was duly recorded in the recorder's office for the county of Alameda, at the request of the defendant, John B. Ward, on the 15th day of March, 1859) the said defendant, John B. Ward, possessed himself of the whole estate of San Leandro and the personal property thereon being belonging to the devisees of the said José Joaquin, and has thence hitherto continued to use, manage, and control the same, or such portions thereof as he has
not alienated and conveyed to other persons, and has ever
435 since the delivery of said instrument to him hitherto assumed
to manage and control the same, and every part thereof, in such manner as he chose to do.

And the plaintiffs further aver, and the fact is, that said plaintiff Magdalena arrived at her age of majority only on the 16th day of April, 1860, and that on the first day of August of the said year 1860 the said defendant John B. Ward, upon the like false pretenses of the better enabling himself to manage her estate in said lands of San Leandro, but really and secretly with the fraudulent design of securing her said estate and interest therein to himself through the dishonest exercise of his influence over her, procured her, the said plaintiff Magdalena, as grantor, to execute and deliver to himself, and on said last-mentioned day she did execute and deliver to him,
an instrument of writing, deed of trust, and letter of attorney
436 similar in all respects to and of the same purport as the said
instrument, deed of trust, and letter of attorney last above set forth, and which said last-named indenture, executed by said plaintiff Magdalena, the said defendant, John B. Ward, did not execute, but received, and on the 31st day of October, 1860, caused to be recorded in the office of the county recorder of Alameda county, and

thereafter proceeded to act thereunder and in pretended compliance with its provisions.

The plaintiffs are informed and believe, and upon such information and belief aver, and the fact is, that the undivided interest and estate in the lands of San Leandro, which was devised by said will to said Maria J. Estudillo, has been set apart to and vested in the said Maria J. Estudillo in severalty, and she has not now any undivided interest in the said lands.

And the plaintiffs further aver, and the fact is, that hereto-
437 fore, to wit, on the 11th day of April, 1866, the said Jesus Maria Estudillo, another one of the devisees under said will, by his deed bearing date of that day, conveyed to said defendant, John B. Ward, for the expressed consideration of $15,000, all his right, title, interest, and estate in the said lands of San Leandro; that in consideration thereof, and as the purchase price of said deed of conveyance, the said defendant, John B. Ward, as trustee aforesaid, on the 30th day of October, 1867, conveyed to said Jesus Maria, in severalty, a divided and several portion of the said lands of San Leandro, and that the said defendant, John B. Ward, now holds the said undivided interest and estate so conveyed to him by the said Jesus Maria, as trustee for the plaintiffs only, and that the said Jesus Maria has not now any undivided estate or interest in the said lands of San Leandro.

The plaintiffs further aver, and the fact is, that the plaintiff
438 Magdalena and her husband, the plaintiff, John Nugent, as grantors, on the 2d day of December, 1861, at the instance and request of the said defendant, John B. Ward, made, executed, and delivered to the said defendant Ward another deed of trust and letter of attorney, bearing date the day and year last aforesaid, of the same purport, and containing the same powers and authority, to the said defendant Ward as the said deed of trust of 15th December, 1858.

That said defendant Ward accepted the said last-mentioned deed of trust from said plaintiffs, Magdalena and John Nugent, and thereafter proceeded to act thereunder and in pretended compliance with its provisions.

That the question of the exterior boundaries of the said rancho San Leandro was finally determined in the Supreme Court of the United States by dismissal of the appeal taken by the United
439 States in that behalf on the — day of March, 1863, and that the plaintiff, John Nugent, who was at the time in the city of Washington representing the interests of the said devisees before said Supreme Court, immediately informed the said defendant, John B. Ward, by telegraphic dispatch addressed to him in California, of the fact of said dismissal of the appeal, and that said defendant, John B. Ward, received said information in California only shortly before the 25th day of March, 1863.

That at the time of the receipt by said defendant John of the information of the dismissal of said appeal the plaintiff, Juana M. Estudillo, was residing at San Leandro in a house of her own, in which house said John B. Ward also resided, and said defendant,

John B. Ward, and his wife, the said defendant Concepcion, and their family, and the plaintiff Juana had always resided together ever since the intermarriage of said defendants, John and
440 Concepcion, and before the death of said José Joaquin Estudillo in the year 1852.

That when the news was received by said defendant John of the final determination of said boundary question of said rancho San Leandro the said plaintiff Juana was on a temporary visit to her said rancho El Pinole (sometimes called "San Joaquin"), in Contra Costa county, and said defendant John, shortly after the receipt by him of said news, repaired to said county of Contra Costa, and there applied to said plaintiff Juana M. for the purpose of procuring a deed from her to the defendant Concepcion, as he stated to her at the time, of an undivided half of her interest and estate in the lands of San Leandro.

That said defendant John at the time represented falsely and fraudulently to the plaintiff Juana that the only object and purpose to be accomplished by her making the proposed deed of conveyance was to enable him to handle the property with greater facility
441 and more easily and conveniently for the purpose of said trust, and to prevent the property being wasted; and he then represented to her that she was not and would not thereby be really alienating or parting with any of her interest in said rancho San Leandro, and that it was a matter of pressing necessity that she should execute the same immediately and without delay.

That said plaintiff Juana M. believed at the time that the statements and representations of said defendant John so made to her in that behalf were true and real, and believed that it was not the purpose or design of the said defendant John to deprive her thereby of any of her estate or interest in said lands of San Leandro, and that so believing she consented to make the proposed conveyance to said defendant Concepcion.

The plaintiffs further aver, and the fact is, that the real pur-
442 pose of said defendant John in making said application and proposal to said plaintiff Juana M. was to vest the legal title to said lands fully in said wife, the defendant Concepcion, apparently freed from any trust whatever in favor of said plaintiff Juana, so that the defendant John might, by the exercise of his influence and authority over his said wife, the defendant Concepcion, the proposed grantee in such deed, the more easily and effectually dispose of said interests for his own benefit or cause the same to be vested by some means in himself, which he subsequently did, as hereinafter stated, and they further aver, and the fact is, that he obtained the consent of said plaintiff Juana to making such conveyance for said one undivided one-half of said land by the fraud and artifice and false and fraudulent representations and pretences aforesaid; that there was in fact no honest or sufficient reason why said plaintiff Juana should convey her interest in said lands
443 to the defendant Concepcion, and such conveyance would not and did not in any wise facilitate any honest use of said lands in the hands or under the control of the defendant John; but, as

the plaintiffs are now informed and believe, and thereupon aver, the real purpose of said defendant John in that behalf was to endeavor by that means to free said lands from the trusts under which they were vested in him by said deeds of trust and to embarrass the plaintiff Juana in the assertion of her rights in the future in respect thereto when, if ever, she should come to assert the same.

That there was no pressing or other necessity for said plaintiff Juana to execute such proposed deed immediately or at all, but for the purpose of said defendant John in falsely urging said pretended immediate necessity therefor was to prevent the plaintiff Juana from consulting with any other person in respect thereto or otherwise informing herself in respect thereto or as to the propriety thereof.

That said defendant John, as an additional reason why said plaintiff Juana should execute said proposed deed of conveyance to said defendant Concepcion, at the time falsely promised the plaintiff Juana and fraudulently induced her to believe that in a short time thereafter he would cause said proposed deed to be returned to her, the said plaintiff Juana M., and would thereby revest her with the undivided one-half interest so thereby proposed to be conveyed to said defendant Concepcion. The plaintiffs aver, and the fact is, that it was not then or ever the purpose of the said defendant John to return said proposed deed to said plaintiff Juana at all, nor to reinvest her in any wise with the title thereby conveyed; that the mere return of such deed to said Juana, even if made, would not revest in her the title thereby conveyed, and that this fact was well known to said defendant John, but was not known to or understood by the plaintiff Juana. The defendant John, having so and by such fraudulent means obtained the consent of said plaintiff Juana to execute such proposed deed to the defendant Concepcion, thereupon presented to her the alleged proposed deed of conveyance, so that she might execute the same, and she thereupon, without examination of the same or informing herself of its contents otherwise than as she had learned the same from the said representations of said defendant, John B. Ward, did execute and deliver the same to the said defendant, John B. Ward without any consideration or anything of value whatever therefor, paid or promised to be paid to her, the said plaintiff Juana.

That the said deed of conveyance so presented to her and executed by her was not in fact a deed of conveyance of an undivided one-half of her interest in said San Leandro lands, but was in fact a conveyance to said defendant Concepcion of the whole of her estate and interest in said lands.

That the plaintiff Juana was ignorant of the fact that said deed purported to convey all her interest and estate in said lands instead of an undivided one-half thereof at the time she executed the same, and that fact was at the time fraudulently concealed from her by the said defendant, John B. Ward, and that the plaintiff Juana never learned or discovered, nor did any of the plaintiffs ever learn or discover, the said fraud in that behalf or any of the frauds or facts constituting the frauds so practiced upon her, the said plaintiff

Juana, by the said defendant John in respect to the execution of said deed of conveyance until within one month last past.

447 The plaintiffs annex to this complaint a true copy of said last-mentioned deed of conveyance, which is marked "Exhibit B," and is made a part of this complaint.

That on or about the — day of March, 1863, the Hibernia Savings and Loan Society, a corporation doing business at said city of San Francisco, at the instance of the defendant, John B. Ward, conveyed or caused to be conveyed to the plaintiff Juana three certain ranchos or tracts of land situate in the county of Santa Barbara, respectively named, bounded, and described as follows, to wit:

First. The rancho or tract of land situated in the county of Santa Barbara, State of California, known as the "Guadalupe rancho," being the same land that was granted to Diego Olivera and Teodoro Arellanes by J. B. Alvardo, Governor of California, on the twenty-first day of March, A. D. 1840, and which was confirmed

448 to said Diego Olivera and Teodore Arrellanes by the board of commissioners, to ascertain and settle private lands in the State of California on the sixth day of December, A. D. 1853, and more particularly described as follows, viz: Commencing at the sand hills (meganos), which are at the place called the mouth of Arroyo del Oso Floco, and running thence eastward the distance of two and one-half (2½) leagues to the road which ascends to the "Mesa de Nipoma," where there is a stake; thence running over "Lano de la Largo," in a southeasterly direction, the distance of three (3) leagues to the high part of the sulphur hills (Lomas de Azufre), to an oak tree, the most easily distinguished; thence running over the same hills, in a northerly direction, the distance of one league and a quarter to the seashore, where there is a morito, and thence running over a cañada the distance of two and

449 one-half (2½) leagues to the place of beginning, and the same land which is described in a map or plan of survey of said "Guadalupe rancho," made by J. E. Terrell in September, A. D. 1860, and now on file in the office of the United States surveyor general for California.

Second. The rancho or tract of land situate in the county of Santa Barbara, State of California, and known as the "Casmolia rancho," being the same land which was granted to Antonio Olivera by J. B. Alvarada, Governor in California, on the twelfth day of September, A. D. 1840, and which was confirmed to said Antonio Olivera by the board of commissioners to ascertain and settle private land claims in the State of California, on the sixth day of March, A. D. 1855, excepting and reserving therefrom that tract thereof conveyed by A. M. Olivera and wife to L. F. Barton on the 29th day of

450 September, A. D. 1855, said "Casmolia rancho," being more particularly described in a map or plan of survey thereof made in September, A. D. 1860, by J. E. Terrell, and now on file in the office of the United States surveyor general for the State of California.

Third. The rancho or tract of land situate in the county of Santa

Barbara, State of California, known as the "El Cajo" or "Punta de la Concepcion" rancho, being the same land which was granted to Anastacia Carillo by J. B. Alvarda, Governor of California, on the tenth day of May, A. D. 1837, excepting and reserving therefrom that part thereof which was conveyed by A. Carillo and wife to Isaac J. Sparkes on the 13th day of October, A. D. —, said "El Cajo" or "Pu-ta de la Concepcion" being more particularly described in a map or plan of survey thereof made in November, A. D. 1860, by J. E Terrell, and now on file in the office of the United States
451 surveyor general for the State of California.

That the consideration and purchase price for said properties was the sum of $53,000 in gold coin.

That said purchase was negotiated, conducted, and concluded by the defendant, John B. Ward, after he had consulted with the plaintiff Juana and her children, plaintiffs, together concerning the same, and that said ranchos were purchased with and out of funds supplied by the said Juana Estudillo and her children, who are plaintiffs in this suit, together with the said Dolores, in the following proportions, to wit, $\frac{9}{15}$ or $\frac{3}{5}$ by the plaintiff Juana and $\frac{1}{15}$th each by the plaintiffs, José Ramon, José Antonio, José Vicente, Luis, Magdalena, and the defendant Dolores, and that none of the said purchase-money was furnished or paid by the said defendant John; that the said defendant John was, at the time of purchasing
452 said ranchos, wholly insolvent; that in order to purchase and to obtain the funds necessary to purchase said ranchos the said plaintiffs and the defendant Dolores, through their trustee, the said defendant John, mortgaged their respective interests in the said San Leandro ranch, and the said Juana mortgaged her undivided $\frac{3}{5}$ths of the said ranchos so purchased, and also her said interest in the Pinole rancho, for that purpose; that although the said Conception Ward joined in the said mortgage, yet her interest in said San Leandro rancho had, at the time of said purchase and at the time of making said mortgage, been sold under execution or order of sale, as hereafter mentioned, and had not then been redeemed, and neither the said Concepcion nor the said John B. Ward had any funds belonging to either of them with which to redeem the interest
453 of the said Conception from said sale; that the said ranchos, the Guadalupe, the Casmolia, and the Punta de la Concepcion, were purchased for said Juana and the other children of the said Juana who are plaintiffs herein, and the defendant Dolores, in the proportions of three undivided fifths to the said Juana, and one-fifteenth each to José Ramon, José Antonio, José Vicente, Luis, Magdalena, and Dolores; that the said Juana and the others for whom said ranchos were so purchased supposed that the deed of conveyance of said ranchos made upon said purchase was made to them all as guarantees in terms according to their respective interests upon the face of said deed, but the truth is that said deed was taken in the name of the said Juana alone as sole grantee therein; that the said defendant John caused the said deed to be made to the said Juana alone for the purpose of the more
454 easily procuring a deed from her to himself in fraud of the

rights of herself and of the other parties interested in the said purchase, and that neither the said Juana nor the other plaintiffs interested in said purchase ever knew that said deed was made to said Juana alone until within a month last past; that the said deed was delivered by the grantor therein to the said defendant John, and was recorded under his direction, and has been retained by him in his own possession ever since, and was never inspected by any of the plaintiffs, and said plaintiffs, and each of them, were ignorant of the actual contents thereof until within one month last past, and that immediately upon the making of the said purchase of the said ranchos the said defendant John assumed and took the actual control and management of all of said ranchos in his said capacity
455 of trustee representing the persons beneficially interested therein, and has ever since retained the control and management thereof; that he has expended thereon large sums of money, which are funds derived to him from the estate of the plaintiffs in his hands as trustee as aforesaid; that he has by the use and application of said frust funds cultivated portions thereof, and now has growing thereon large and valuable crops, and a large stock of horses and cattle, but has expended no moneys of his own thereon.

That prior to the twenty-third day of January, A. D. 1861, the said John B. Ward, for his own private purpose, had borrowed of one Wm. N. Spear a large sum of money, and to secure the repayment of the same the said defendants, John B. Ward and Concepcion Ward, had united in a mortgage to the said
456 Spear of all the right, title, and interest of the said Concepcion in the said San Leandro rancho; that the sum secured by the said mortgage amounted on the 1st day of August, A. D. 1861, to eighteen thousand one hundred and ninety-three dollars, and on that day a decree of foreclosure was regularly rendered by the district court of the third judicial district of the State of California, sitting in Alameda county, for the sale of said mortgaged interest, to pay the amount so secured as aforesaid, and for two hundred and fifty dollars, costs of action; that on the 22d day of December, A. D. 1862, the interest of the said Concepcion Ward in said San Leandro rancho was sold by the sheriff of said county, in pursuance of said decree of foreclosure, to one Mulford, for fourteen thousand dollars, leaving a deficiency of seven thousand eight hundred and five dollars and twenty-two cents due from the said defendant, John B. Ward, on said decree; that on the 28th
457 day of April, A. D. 1863, the said defendant, John B. Ward, applied certain funds then in his possession as trustee of the said Juana Estudillo and her children, who are here made plaintiffs, received by him under the trust hereinabove described, to the redemption of the interest of the said defendant Concepcion in said San Leandro rancho, which had been sold as aforesaid, and on the 22d day of October, 1863, applied certain other of the trust funds so held by him as trustee aforesaid to the payment of the balance so as aforesaid due by him on the said decree of foreclosure, whereby the interest of the said Concepcion in the said San Leandro rancho

is become held and bound unto the said plaintiffs herein for the said sum, with interest, from the time of said payments.

And the plaintiffs aver, and the fact is, that the said defendant, John B. Ward, has continuosly, and ever since he obtained
458 the said deed of trust of December, 1858, been secretly and unknown to the plaintiffs devising schemes and artifices by which to embarrass the plaintiffs in the preservation of their rights in said property aforesaid, and by means of conveyances devised by him from time to time to be executed by the plaintiffs to each other and from the plaintiffs to himself has contrived to embarrass and confuse the interests of the plaintiffs in the premises.

That the principal practical difficulty that the said defendant John found in his way in the acquisition for himself of said properties grew out of the fact that the interests of the children of the said José Joaquin remained vested in them, respectively, subject to said deed of trust to himself, and were therefore more difficult to secure than they would be if concentrated in some particular one of the plaintiffs from whom he could procure the same to be con-
459 veyed to himself by means of a single deed.

That, knowing his absolute control, and which he, in fact, held and exercised habitually over the plaintiff Juana until a few weeks last past in respect to her property, and knowing the implicit confidence she habitually reposed in him and the ease with which he could induce her to comply with his requests, he conceived the plan of first getting the other plaintiffs (children of said plaintiff Juana) to convey their interests in said lands to said plaintiff Juana, their mother, upon some artful and false pretense devised by him which would be the less likely to be questioned or suspected, because no conveyance being made to himself at the time it would seem that he could have no personal interest to promote by causing the children of the plaintiff Juana to convey to their own mother
460 their interests in said estate to keep it for them.

That in pursuance of this scheme, in the month of March, 1864, he suggested to and earnestly advised the plaintiffs, José Ramon, José Antonio, José Vicente, and Luis that they should convey their respective interests in the lands of San Leandro to the plaintiff Juana, their mother, in exchange for her interests in the said rancho "El Pinole."

The plaintiff, José Antonio, at the time declined to do so, alleging that he did not wish to part with the patrimony which his father had left him; but the other three plaintiffs last aforesaid consented to the arrangement, upon the advice of said defendant, John B. Ward, at the time, to the effect that it would be better for the interests of all concerned in said property. Upon similar advice given by said defendant, John B. Ward, to the plaintiff Juana, and
461 the representation made to her by the said defendant, John B. Ward, that it was required for the better management of the business of the trust which he had in charge for them all, and induced by her confidence in his integrity of purpose in dealing with said property, the plaintiff Juana was also pursuaded to consent to said proposed exchange.

That accordingly, in unintentional pursuance of said fraudulent scheme of said defendant John, the plaintiff Juana did, in March, 1864, convey to her said three sons—José Ramon, José Vicente, and Luis—her interest in rancho "El Pinole," and received from them a conveyance of their respective interests in said lands of San Leandro; that the interest in "El Pinole" thus conveyed to said three sons was the same interest which said defendant John had originally intended to have had exchanged for said three interests and the additional interest of José Antonio; that the said Pinole interest so conveyed by
462 the plaintiff Juana as aforesaid was included in the mortgage hereinabove described as given for the purchase of the three ranchos, the "Guadalupe," the "Cosamlia," and the "Punta de la Concepcion;" that afterwards, on the 30th day of January, A. D. 1867, the said defendant John induced the said plaintiffs, José Ramon, José Vicente, and Luis D., to convey to him their estate in the said Pinole, and they, believing that it would be for their interest to do so, and having full faith in the good intentions and integrity of the said John D., defendant, did execute to him a conveyance of grant, bargain, and sale of all their estate in the said Pinole; that the said Ward at the time represented to them that they were making said conveyance to him simply for the purpose of enabling him to sell the same for their interest and welfare; that afterwards the said Ward induced the said José Ramon, José Vicente,
463 and Luis to join with him in a conveyance of said estate in the Pinole, and said Ward received therefor from the purchaser thereof the sum of forty-two thousand five hundred dollars in gold coin, and that in fraud of the rights of said José Ramon, José Vicente, and Luis D. said Ward applied the greater part of the purchase-money to the payment of the said mortgage so as aforesaid given for the purchase of the ranchos "Guadalupe" and "Casmolia" and "Punta de la Concepcion" aforesaid, thereby unjustly and fraudulently throwing an undue and unjust portion of said incumbrance onto the Pinole interest and relieving the interest claimed by him in the rancho San Leandro and the other ranchos included in said mortgage, and that the just proportion which should have fallen on the Pinole interest would not have exceeded four thousand dollars.

That in the month of April, 1864, the said defendant, John
464 B. Ward, having failed up to that time to get the interest of said José Antonio in the San Leandro lands vested in his mother, the plaintiff Juana, under the pretense of the Pinole exchange, formed a new plan to induce said plaintiff José Antonio to make such conveyance of his interest in the San Leandro lands, which said plan was as follows: The said plaintiff José Antonio was going away from the State of California to the neighboring State of Nevada, to be absent some considerable time, and said defendant John artfully suggested to said José Antonio that advantages of some kind might be taken of him concerning his property in some way, and that he was going among strangers and sharpers, and that they, by some means, might get some advantage of him about his property, and, therefore, that he ought to put the title to his San Leandro
465 lands in his mother, the plaintiff Juana, just to keep for him

during his proposed absence, and to return it to him when he should come back to California. Said plaintiff José Antonio was favorably impressed with this idea, and, not comprehending how he could be injured by trusting his own mother, consented to the arrangement; and thereupon, on the said 23d day of April, 1864, he did execute an instrument by which he, in terms, conveyed all his estate in said lands of San Leandro to his mother, the plaintiff Juana, for the nominal expressed consideration of $10,000, but really for no consideration whatever paid or promised to be paid therefor, but only upon the trust, as he supposed, that said plaintiff Juana, the nominal grantee in said instrument, would thereafter, upon his request to her to do so, reconvey the said estate and interest to himself. On said 23d day of April, 1864, said plaintiff José Antonio
466 acknowledged the execution of said conveyance, in the said county of Alameda, before the county clerk thereof (was granted a certificate thereof in the usual form), and delivered said instrument of conveyance to the defendant, John B. Ward, who on the same day, to wit, the said 23d day of April, 1864, filed the said deed of conveyance in the office of the county recorder of said county of Alameda for record, a copy of which said deed of conveyance, with the certificate of acknowledgment and the filing of the same of record, is annexed to this complaint, marked "Exhibit C," and made part hereof.

That neither at the time of the making or recording of said last-mentioned deed of conveyance, nor at any time thereafter until the month of October, 1867, did the plaintiff Juana ever know or suspect in any wise that said last-mentioned conveyance had
467 been made to her, and during all said time said defendant, John B. Ward, artfully and corruptly, and for the purpose of fraudulently procuring to himself a conveyance of said estate of said José Antonio in said San Leandro lands by the means hereinafter mentioned, concealed from the knowledge of the plaintiff Juana the fact that she had been made the grantee of the estate of said plaintiff José Antonio in said San Leandro lands.

That on the 16th day of August, 1864, the plaintiff Juana was in fact (except in so far as her rights could be supposed to be affected by the fraudulent procurement from her of the said supposed deed of gift to the defendant Concepcion as aforesaid) the owner in her own right as devisee under said will of the undivided one-half, and by said Pinole exchange transaction the owner of an addi-
468 tional three undivided eighteenths of the said San Leandro lands then remaining unsold or undisposed of to third persons, and was also the owner of an undivided three-fifths interest in the said ranchos of "Guadalupe," "Cosmalia," and "Punta de la Concepcion."

That by the artifice and fraudulent management of said defendant John, however, she had become, and was on said day, without her knowledge, the involuntary holder and apparent owner and proprietor of another undivided one-eighteenth of said San Leandro lands, which was really the property of the plaintiff José Antonio, and also, by the like aforesaid artifice and fraudulent management

and contrivance of said defendant John, she was on said day the involuntary holder and apparent but not the real owner of the other undivided six-fifteenths of said ranchos "Guadalupe," "Cosmolia," and "Punta de la Concepcion," which said last-named
469 undivided six-fifteenths, however, really belonging to the plaintiffs, José Ramon, José Antonio, José Vicente, Luis, Magdalena, and the defendant Dolores in equal proportions.

That on said last-mentioned day the plaintiff Juana was utterly ignorant of the fact that she held, or seemed or appeared to hold, the title to the said undivided one-eighteenth of said lands of San Leandro, which was the property of the said plaintiff, José Antonio, for the said six-fifteenths of said ranchos "Guadalupe," "Cosmolia," and "Punta de la Concepcion," which was so the property of her said six children as aforesaid; and said defendant John on said day well knew that she was ignorant of said facts and artfully concealed from her any knowledge thereof at the time; that he procured her to execute and deliver to him the deed of conveyance, bearing date the day and year last aforesaid, and presently hereinafter mentioned.

470 That on said last-mentioned day the actual cash value in gold coin of the three-fifths ($\frac{3}{5}$ths) belonging to the plaintiff Juana of the said ranchos "Cosmolia," "Guadalupe," and "Punta de la Concepcion" was not less than $60,000, and that the actual cash value in like coin of the two undivided thirds ($\frac{1}{1}\frac{2}{8}$ths) belonging to her of said San Leandro lands remaining unsold to third parties was not less than $255,000.

That her said interest of an undivided two-thirds of said San Leandro lands was subject to an indebtedness resting thereon of not exceeding $52,000, and her said undivided three-fifths of said ranchos "Guadalupe," "Cosmolia," and "Punta de la Conception" was subject to an indebtedness resting thereon of not exceeding $13,500.

That the amount of the annual rents in gold coin which her said undivided two-thirds of said San Leandro lands was then
471 producing into the hands of said defendant John was not less than $16,000, and that while the said ranchos of "Guadalupe," "Cosmolia," and "Punta de la Concepcion" were not producing any annual returns in the way of rent they were beginning to rise in price, and offered a good prospect of immediate future increase in value.

And these plaintiffs further say that the said defendant Dolores was married to the defendant Charles H. Cushing on the fifteenth day of August, A. D. 1864, at the house then occupied by plaintiff, Juana Estudillo; that at the marriage the members of the family, excepting José Ramon, were present, and all left the house immediately after the marriage ceremony, with the exception of said Juana Estudillo, Magdalena, and Conception, and that during the 16th day of August, A. D. 1864, the said defendant John, Conception, his wife, and Magdalena were alone in the house with the
472 said plaintiff Juana; that the said defendant John had never communicated to any member of the family, and did not then or at any time, as the plaintiffs are informed and believe, and

therefore charge, ever communicate to any member of the family, except to the plaintiff Juana, on that occasion his intention of purchasing any of the property so held by him in trust as aforesaid of the said plaintiff Juana, though all the members of the family had been assembled together to celebrate the marriage as aforesaid, excepting the said José Ramon; that on the said 16th day of August, A. D. 1864, the said defendant John, trustee as aforesaid, procured from the said plaintiff Juana a deed of all the property held in trust for her by the said defendant John, including the ranchos "Cosmolia," "Guadalupe," and "Punta de la Concepcion," a copy of which deed is hereto annexed and made part of this com-
473 plaint, marked "Exhibit D."

That the effect of said deed when considered in connection with the conveyances so as aforesaid taken by said John in the name of the plaintiff Juana, without her knowledge, was to convey, and was designed by said defendant John to convey, to him, not only the undivided two-thirds of said lands of San Leandro so actually owned by said plaintiff Juana, but also the undivided one-eighteenth thereof really belonging to said José Antonio, and convey to him, not only the undivided three-fifths of the said rancho- "Guadalupe," "Cosmolia," and "Punta de la Concepcion" really owned by said platntiff Juana, but also the undivided six-fifteenths therein really belonging to her said children as aforesaid.

That said defendant John well knew and fraudulently intended that, and fraudulently concealed from the plaintiff Juana at the time, the fact that said conveyance did so convey to
447 and vest in him the said interests of the said children in said respective properties and ranchos aforesaid, and that none of the plaintiffs learned or ascertained the fact that such interests had been so conveyed to said defendant John until within the past eight months, and in fact within a much shorter period of time, and not until, the suspicions of the plaintiffs having been aroused in respect to the integrity of the defendant John in his dealings with their property, they had begun for the first time to investigate for themselves into his acts and doings relative thereto.

That although the defendant John had had to himself the *the* absolute exclusive management and control of all said property for near six years he had never rendered or offered to render to any of the plaintiffs any account whatever or to show them in any wise any details or give them any information of what he had actually
448 done with the said property or its rents and profits; that the plaintiff Juana was, on the said 16th day of August, 1864, actually uninformed in the slightest degree of its condition; that she had, and all the plaintiffs had, during all said time been accustomed to receive from the defendant John such and only such sums of money in small amounts as they actually needed for immediate use, from time to time, and as he chose to furnish to them upon their application to him.

That said defendant John had, during said time after 1858, sold considerable portions of said lands at prices fixed by himself, and of the amounts for which such sales had been made the plaintiffs

had never been informed; and these plaintiffs are informed and believe, and aver upon such information and belief, that the amount of money received during said time by said defendant John
449 from such sales, and from the rents and profits of said lands was as much as $500,000 in gold coin, and that the sums so received by him were more than sufficient to pay off and discharge all indebtedness that had ever been incurred, and after paying all expenses and the purchase-money of the "Guadalupe," "Cosmolia," and "Punta de la Concepcion" ranchos would leave in his hands a very large sum of money unaccounted for, being the money of the plaintiffs.

That at the time of the procuring of said conveyance the said defendant, John B. Ward, represented to the plaintiff Juana, and she believed, that the indebtedness resting upon said property was really a *bona fide* indebtedness of $100,000, gold coin, and he induced her to believe that statement to be true in fact; but the plaintiffs are informed and believe, and, therefore, charge, that such indebtedness, if the same really existed, was caused solely by the misappli-
449 cation of the funds and moneys in the hands of the defendant Ward, and received by him as trustee of the plaintiffs, and which ought to have been applied by him to the payment of such indebtedness, and if said defendant Ward had truly applied said monies, as he ought to have done by the terms of said trust deeds, the said properties would have been then free of all incumbrances whatever. And the plaintiffs further aver that, as a further reason why the plaintiff Juana should make said deed to him, he, the said defendant Ward, then falsely represented to her that the expenses of her children had been very great, and that they had been very extravagant, and induced her to believe that statement to be true, and she, having no other means of knowing what said children had received or expended except by the representations of said defendant Ward in that behalf, believed said statement to be
450 true, whereas in truth and in fact the said children of the plaintiff had never been furnished by said defendant Ward with any considerable sums of money when compared with the income and value of their estates, but had been put off by said Ward from time to time with comparatively insignificant sums and amounts of money; and said defendant also represented to her at the time that it would be better for her to convey said properties to him, because by that means the children would cease to apply to her for money, whereas, when it was in his hands, he would so arrange it as to benefit the children and their interests and secure to them a home forever.

That at the time of making said deed the said Ward stated to the said Juana that she was to receive the consideration therefor,
451 to wit, $80,000 in gold coin, and said to her, "Think of it, Commadre, how rich you will be with so much gold. What will you do with so much gold?" That the said Ward caused her to give him a receipt in said deed for the sum of eighty thousand dollars in gold, as if she had received the same at the time of the execution of the said deed by her to the said John B. Ward; but

the truth is that the said Ward did not at the time of the execution of said deed, nor has he at any time since, paid to the said Juana the said eighty thousand dollars nor any part thereof.

That when said deed had been executed by the said Juana to the said John B. Ward the said Ward placed before her ten promissory notes, signed by the said Ward, for the sum of eight thousand dollars each, payable one every year during ten years, the first one year after the date of said deed; that said notes did not bear interest
452 until after maturity; that the said Ward caused the said Juana to believe that said notes represented in some way the eighty thousand dollars in gold coin which he had stated to her would be the consideration of the said deed; that the said Juana, relying fully on the friendship and confidential relations which existed between her and the said Ward, and from the fact that she habitually entrusted all her business matters to his control, and having full faith in his integrity, did not read said notes, nor did she ever know their contents nor the contents of any of them until within eight months last passed, but that she supposed, and it was so represented to her at the time by the said defendant, John B. Ward, that the said notes were the full equivalent of the eighty thousand dollars in gold which the said Ward had assured her was the con-
453 sideration of giving said deed and for which he had taken her receipt.

That said notes remained a short time in the presence of the said Juana and immediately thereupon were taken by the said John B. Ward and were placed in a safe kept by him and under his control, and have remained in the possession and control of the said John B. ever since, with the exception that once, about two months before the commencement of this suit, Jesus Maria, a son of the said Juana and a clerk of said Ward, procured said notes from said safe without the consent of the said Ward for the purpose of examining them; that said notes were in the hands of said Juana about two days, and thereupon were returned by her to her said son, who was the clerk of said Ward, and that her said son delivered them to the said Ward, and they have remained in his possession ever since;
454 that the said Juana never had an opportunity of examining said notes until they were so as *as* aforesaid procured for her by her son as aforesaid, and never had them, or any of them, in her control or possession, excepting as above stated.

That the said Juana was wholly ignorant of the fact that said notes did not bear interest until after maturity, until within some two months before the commencement of this action, and that when the effect and tenor of said notes were explained to her she was wholly astonished and surprised; that said notes bore interest at the rate of one per cent. per month after maturity; that said interest was greatly below the current rates at the time of executing said notes; that said notes were wholly unsecured by any mortgage, pledge, or lien on any property, either real or personal, and were based wholly upon the personal responsibility of the said
455 Ward; that the said Ward at the time of signing the said notes was wholly insolvent.

That the said John B. Ward did not pay such of said notes as have since matured, or any part thereof, but the same are wholly due and unpaid, nor has he ever spoken to her, the said Juana, about paying the same; and these plaintiffs aver that at the time of the execution of said deed by the said Juana to the said John B., and before and ever since the said Ward had constantly the intention of not paying to the said Juana any consideration for the said deed, and that the said Ward never has paid to the said Juana any money whatever for the land mentioned and described in said deed.

That the said notes which the said John B. Ward substituted for the real consideration, to wit, $80,000 in gold coin, were wholly an inadequate price for the lands described in said deed from the
456 said Juana to the said John B.; that said lands at the time of said conveyance were well worth four hundred thousand dollars in gold coin; that the annual rent and income of said lands described in said deed were at least twenty thousand dollars per annum in gold coin; that though the lands were encumbered by the said John B. Ward as above stated, yet in truth the said Ward was at that time indebted to the said Juana and children, plaintiffs herein, in more than the amount of said incumbrances, and that said incumbrances were placed upon said land by the said Ward for his own private purposes and in fraud of his trust, and in no wise for the purpose of carrying out said trust; that said notes, even if the same had ever come under her control, could not be negotiated for any considerable sum, and would have been almost valueless to the said Juana for any purpose whatever; that she could raise
457 no money upon them, and that they were wholly inadequate and inapplicable to the support of herself or family; that even if said defendant Ward had been solvent and able out of his own means to pay said notes, which he was not, and if said notes had been fully secured by good and sufficient mortgages, still that said notes would not have been worth, in the state of the money market, more than thirty thousand dollars in gold coin, and that said notes were for a far less sum each than the said Juana would or ought to have received annually as rents and profits from her said lands; that the said Juana was so utterly ignorant of the usual course of business and of the proper and customary rate of interest that she would not have understood said notes even if they had been read to her, nor have known that such a mode of re-
458 ceiving pay for land was [an] extraordinary and unusual transaction, and that she paid no attention whatever to the deed or the notes, as she had placed all her pecuniary affairs in the hands of said John B., and considered that in all things he was still acting for her as her trustee and agent, and that she therefore never consulted or advised with any person concerning said transaction other than the said defendant John B.

That the said defendant John B. never did return to the said Juana the interest which he had caused her to convey to the said Concepcion Ward, as hereinabove stated, but that after the execution of the said deed by the — Juana to the said John B., to wit, on the 25th day of January, A. D. 1865, the said John B. caused his wife

Concepcion to unite with him in a deed to the defendant, Charles H. Cushing, and that on the same day and at the same time
459 and as a part of the same transaction the said Cushing reconveyed the said interest to the said defendant, John B. Ward, and that the only object of the said conveyance to the said Cushing was to enable the said Cushing immediately to convey the said interest to the said John B. Ward, and thus to consummate the fraud which the said Ward intended to perpetrate when he perpetrate when he pursuaded the plaintiff Juana to convey to the said Concepcion the said interest in said San Leandro lands, as hereinabove stated. A copy of the two last-mentioned deeds is annexed to this complaint and made part thereof, and respectively marked Exhibit E and Exhibit F.

And plaintiffs further say that the said defendant John B. invested certain of the trust funds so as aforesaid received by him from the trust property aforesaid in the purchase of, and now holds in his own name, the following-described land, among other
460 purchases made by him with the said trust funds, to wit: all that certain piece, parcel, or tract of swamp and overflowed land, situated in Alameda county, described as follows, viz: Township No. 3 south, range No. 3 west, Mount Diablo meridian, section No. 10, the fractional northeast part of the N. W. ¼ of section 10, more particularly described in the field notes of survey No. 208, swamp and overflowed lands, Alameda county, as follows: Beginning at a stake on the section line, between sections Nos. 3 and 10, 20.00 chains west of the corner common of sections 2, 3, 10, and 11, of township No. 3 south, range No. 3 west, of Mount Diablo meridian; thence west 44.70 ch's to a stake on the margin of the Bay of San Francisco; thence along said bay S. 20 deg., E. 16.00 ch's, S. 52¼ deg., E. 17.00 ch's, S. 24¾ deg., E. 16.02 ch's to a stake; thence E. 19.08 ch's to a stake; thence north 40.00 ch's to the place of beginning, containing $129\frac{60}{100}$, run by the true meridian; variation,
461 16 deg. east, being the same tract of land conveyed to said John B. Ward by M. A. Bacon by deed, bearing date the sixth day of May, A. D. 1867, and recorded in Book X of the deeds, pages 640 and 641, of Alameda county records.

Also that certain piece, parcel, or tract of swamp and overflowed land lying, being, and situate in the county of Alameda and State of California, and bounded and described as follows, viz: Beginning at a stake at the corner common to sections 2, 3, 10, and 11, T. 3 S., R. 3 W.; thence, 1st, south 20 chains to [a] stake; 2d, east 20 chains to a stake; 3d, south 40 chains to a stake; 4th, west 20 chains to a stake at the S. E. corner of survey No. 119; 5th, north 20 chains to a stake at the N. E. corner of said survey; 6th, west 20 chains to a stake at the N.W. corner of said survey; 7th, south 20 chains to a stake at the S. W. corner of said survey; 8th, east 20 chains to the stake at the said southeast corner thereof; 9th, south 17.95 chains to a
462 stake on the margin of the Bay of San Francisco; thence along said bay; 10th, W. 78 deg., W. 150 chains; 11th, north 32¼ —, W. 16 chains; 12th, N. 79¾ deg., W. 20.28 chains; 13th, N. 28¼ deg., W. 13 chains; 14th, N. 20¼ deg., W. 10 chains to a stake; thence,

15th, east 19.08 chains to a stake; 16th, north 40 chains to a stake on the margin of the dry land; 17th, east at 10 chains leave dry land 20 chains to the place of beginning; run by the true meridian; magnetic variation, 16 deg. east, containing two hundred and seven $\frac{09}{100}$ (207.09) acres, being known and designated as survey No. 223, swamp and overflowed lands, being the same tract of land conveyed to said defendant, John B. Ward, by one D. D. Mann, by deed dated September 26th, A. D. 1867, and recorded in the county recorder's office of the county of Alameda, book Z of deeds, page 547, &c.

The plaintiffs further aver, and the fact is, that the said de-
463 fendant, John B. Ward, in open violation of his duty as trustee for the plaintiffs, has affected to make, and has made, donations and gifts to various persons of portions of the interest and estate of the plaintiffs.

That, among others, he has made and delivered a deed of gift to one J. C. Pelton for the nominal consideration of $600, no part of which was ever paid or agreed to be paid, a copy of which deed is hereto annexed and made a part of this complaint and marked Exhibit G, and also another deed of gift to the defendant Dolores, purporting to be made for love and affection, and for which no consideration was paid or agreed to be paid, a copy of which is hereto annexed and made a part of this complaint and marked Exhibit H; that the value of the property given away by said defendant John in these two instances alone exceeds the sum of $15,000 in gold coin.

And the plaintiffs are informed and believe, and upon
464 such information and belief they aver, that said defendant, John B. Ward, in violation of his duties as their trustee, has made some agreement or arrangement with the defendant, Francisco La Costa, concerning the use and occupation by said defendant, and concerning some pretended rights of the said defendant, Francisco Le Costa, to purchase of said defendant John B. Ward the whole or some portion of the said tract of land situate in the county of Santa Barbara called "Punta de la Concepcion," and said La Costa has received possession of the same from said defendant John, of the details and particulars of which agreement the plaintiffs are not informed and are wholly ignorant; but they aver, and the fact is, that the said defendant, Francisco La Costa, at the time he made such pretended arrangement and agreement with the said defendant John and entered into the premises, well knew that the plain-
465 tiffs were the owners in fact of said rancho, and he then had notice of all and singular the rights of the plaintiffs in the premises, and that he paid the said defendant John no value, or thing of value, therefor, and that the said defendant, Francisco La Costa, now holds such pretended rights and interests in said rancho "Punta de la Concepcion" only in trust for the plaintiffs, and subject to their rights therein as the true owners thereof.

And the plaintiffs aver, and the fact is, that they were, and each of them was, until within three years last past, and indeed until within three months last past, ignorant and uninformed that said defendant, John B. Ward had committed any of the said several

frauds and concealments and breaches of trust aforesaid in this complaint set forth.

That they did not, nor did any or either of them, discover
466 or suspect at all that said defendant John had committed or been guilty of any one of said several frauds and fraudulent acts aforesaid until within the last three years and until within one year last past, but all the time since the respective times of the commission thereof by said defendant John the plaintiffs have been, and each of them has been, utterly ignorant and uninformed thereof.

That the said defendant John has, until within the period of ten months last past, carefully and successfully concealed from said plaintiffs and each of them each and all of the said several frauds and all the facts aforesaid constituting the said several frauds and fraudulent acts aforesaid so done and committed by the said defendant as aforesaid, and that the defendant, John B. Ward, has lately, and within one year last past, first commenced to set up and pretend, and he now pretends, that he is himself the owner
467 of all the said trust property aforesaid, and they aver that the plaintiffs were, and each one of the plaintiffs was, ignorant and uninformed of such pretensions and claims of said defendant, John B. Ward, until within the said period of one year last past.

And the plaintiffs further aver, upon and according to their information and belief, and they are informed *and they are informed* and do believe, that the said defendants, John B. Ward and Concepcion A. Ward, Charles H. Cushing and Dolores Cushing, his wife, have confederated together to protect the said defendant John from his just responsibility for the perpetration against the plaintiffs of the said wrongs and breaches of his said trust and to shield him accountability therefor.

That the plaintiffs are informed and believe, and upon such information and belief they aver, that the said defendant John
468 has heretofore conveyed to some one or more or all of his co-defendants herein in trust for himself and his confederates, or some one or more of them, various portions of or interests in the said trust property aforesaid, and that the instruments by which such conveyances have been made are kept in secret by said defendants and not placed on the records of the county of Alameda or Santa Barbara in order to conceal from the plaintiffs any accurate knowledge or information concerning their contents or details, and that the said defendants have confederated together and with other persons whose names are as yet unknown to the plaintiffs (and whom, when their names shall be discovered, the plaintiffs pray leave to add as parties defendants hereto with apt words to charge them) to conceal from and deprive the plaintiffs of their said interests and estate and rights in said trust property and real estate, lands, tenements, rents, profits, personal property, and moneys
469 and things of value aforesaid.

And the plaintiffs further aver, and the fact is, that the said defendant, John B. Ward, is now utterly insolvent and pecuniarily unable to respond at all to any mere personal judgment which the plaintiff- might obtain against him in this action or upon an ac-

counting had concerning the said trusts under the decree of this court.

That the said defendant John has no property or estate whatsoever, real, personal, or mixed, except such as he has so fraudulently acquired and got control of by said fraudulent actings and doings against the plaintiffs as aforesaid.

That he has never had any business or pursuit whatever since the year 1852 in the State of California, nor pretended to do any business except such as he pretended to do about the said trust property so belonging to the plaintiffs.

470 That the said defendant John now gives it out that he is, and he represents himself to be, worth more than one-half million of dollars; but these plaintiffs aver, and the fact is, that said defendant has no property or money whatever in his possession or under his control, except such as is the trust property or the fruits of the trust property aforesaid, and really belonging to these plaintiffs or to the *cestuis que trust* in said several deeds of trust aforesaid.

Plaintiffs aver, on information and belief, that the said defendant, John B. Ward, is now fallen into the most intemperate and extravagant habits of life; that he habitually expends very large sums of money in his personal expenditures; that he is rapidly dissipating and making away with the said trust property, which is becoming utterly lost to the plaintiffs; that he is threatening to sell the said lands, or such part of them as remain unsold, in open dis-

471 regard and in violation of plaintiffs' rights and for his own benefit, and the plaintiffs are informed and believe, and they charge and aver, that he will sell and dispose of the same unless restrained therefrom; that he is steadily appropriating to himself the whole of the rents and profits of all said trust estate; and the plaintiffs are informed and do verily believe, and upon such information and belief they aver, that unless the said defendant, John B. Ward, shall be, pending this action, removed by this court from his trust over their property, that the same will be wholly lost to them, and — will thereby be inflicted upon the plaintiffs' great and irreparable injury, loss, and damage.

That said defendant, John B. Ward, never gave to the plaintiffs or any of them any security whatever for the faithful performance of the said trusts, and is now controlling and possessed of said trust estate, and that if he is permitted to remain in posses-

472 sion or control thereof pending this action the said trust estate and all its rents and profits will be wholly lost to the plaintiffs.

And the said plaintiffs aver, upon and according to their information and belief, and they are informed and do believe, that the said defendant, John B. Ward, has now in his possession or under his immediate control large sums of money in United States gold coin, which he has received as the product and proceeds of their said properties and of his management and control thereof, but of the precise amount or amounts thereof the plaintiffs are not particularly or in detail advised or informed, and that the said defendant

John fraudulently conceals from them all information of the particular amount thereof.

That they are informed and do believe, and upon such in-
473 formation and belief they do aver, that there is now on deposit at the bank and at the banking house of Donohue, Kelly & Co., in the said city of San Francisco, and in the hands of said Donohue, Kelly & Co., bankers, doing business in said city and county of San Francisco, a large sum of money, the particular amount whereof they are uninformed, and are therefore unable to state with certainty, deposited in the name of the defendant John and subject to his check, and which was so deposited by or for the said defendant John.

That said moneys and the whole thereof being on deposit in the hands of said Donohue, Kelly & Co. are in fact the moneys and funds of these plaintiffs, and the same ought to be paid over to them or to the receiver to be appointed by this court for their bene-
474 fit, and the said defendant John will, unless restrained therefrom, withdraw said moneys from the hands of said Donohue, Kelly & Co., and appropriate the same to himself, whereby the same will be wholly lost to the plaintiffs, and they aver that the said defendant John ought to be restrained therefrom.

That these plaintiffs are informed and believe, and upon such information and belief they do aver, that said defendant John has now in his possession or under his immediate control other large sums of money in United States gold coin, which he has received as the product and proceeds of their said properties and of his management and control thereof, but of the precise amount or amounts thereof the plaintiffs are not particularly or in detail advised or informed, and that the said defendant John fraudulently conceals from them all information of the particular amount thereof;

that they are informed and do believe, and upon such informa-
475 tion and belief they do aver, that there is now on deposit at the bank and at the banking house of the "Hibernia Savings and Loan Society," in the hands of said "Hibernia Savings and Loan Society," bankers, doing business in said city and county of San Francisco, a large sum of money, the particular amount whereof they are uninformed and are therefore unable to state with certainty, deposited in the name of the said defendant John and subject to his check, and which was so deposited by or for the said defendant John; that said moneys and the whole thereof so being on deposit in the hands of said "Hibernia Savings and Loan Society" are in fact the moneys and funds of these plaintiffs, and the same ought to be paid over to them, or to the receiver to be appointed by this court

for their benefit, and that the said defendant John will, unless
476 restrained therefrom, withdraw said moneys from the hands of said "Hibernia Savings and Loan Society," and appropriate the same to himself, whereby the same will be wholly lost to the plaintiffs, and they aver that the said defendant John ought to be restrained therefrom.

And the plaintiffs further aver, upon and according to their information and delief, and they are informed and do believe, that the

said defendant, John B. Ward, has under his control and subject to his order divers other large sums of money deposited in the hands of divers persons, banks, business houses, or agents of his, and whose names and the respective amounts so held by them on deposit, or in their hands, are concealed by the defendant John from the knowledge of plaintiffs, and these plaintiffs are wholly ignorant and uninformed in relation thereto; but they aver, and the fact is, that all such moneys or sums of money whatsoever, deposited or be-
477 ing held by whatsoever banks, banking houses, corporations or persons, are in truth and in fact only the products, rents, sale money, profits, and produce of said trust estate and are wholly the property of these plaintiffs and ought to be preserved and held under the orders of this court for the purpose of a settlement of the matters connected with said trust, and that the said defendant John ought to be enjoined from collecting, and said banks, banking firms, corporations, and persons ought to be enjoined from paying, the same over to said defendant John.

That the plaintiffs are informed and do believe, and upon such information and belief they do aver, that one Job C. Davis, one Diven, one Townsend, the defendant, Charles H. Cushing, one F. Rattee, John Madigan, William Madigan, Baldwin Smalley, Charles T. Harrison, Stratton, J. Coppe & Co., and Jesus Maria Estudillo have respectively in their possession or under their control
478 for said defendant John, and subject to his order, at the city and county of San Francisco, the county of Alameda, and the county of Santa Barbara, and at the county of San Luis Obispo, respectively, divers moneys, effects, goods, wares, merchandise, farming utensils, growing crops, provisions, liquors, wines, furniture, bar fixtures, billiard tables and furniture, hogs, cows, dairies, horses, mares, colts, buggies, carriages, saddle horses, driving horses, harness, saddles, whips, blankets, and other personal property, a more particular description of which the plaintiffs are unable now to give to the court, and all which said moneys and personal property aforesaid are really the property of the plaintiffs, and not any part thereof in fact the property of said defendant, John B. Ward, and which he ought to deliver over to the plaintiffs as being, which they in fact are, entirely the proceeds, produce, rents, profits, and fruits of
479 said trust property, and are now a part of the trust property concerning which said defendant John ought to account with the plaintiffs; and the plaintiffs aver that said defendant John, unless restrained therefrom, will in some way dispose of and make away with the said moneys and personal property, and the same will be thereby wholly lost to them, and that in order to preserve the same for the plaintiffs a receiver ought to be appointed by this court to collect, receive and take care of the same.

That the said defendant John has lately made divers leases and agreements with divers persons, respectively (the names of some of whom are unknown to the plaintiffs, and the plaintiffs are therefore unable to state them), and among with the following persons, to wit: John Matthews, William Sand, Barney Glancing, Charles Harrison, Jerry Regan, John Madigan, William Madigan, Frank Sullivan,

—— Regan, Gorman F. Ritter, —— Baldwin, —— Shirley, and W. F. Bowman, whereby he leased and *to* farm let various
480 portions and parcels of said San Leandro lands, in some instances having buildings thereon, and from whom there will be shortly due divers large sums of money as rents of said lands so leased to them respectively, but the particular amount thereof the plaintiffs are uninformed and unable to state, and which said amounts of money the said defendant John will, unless restrained, receive from said tenants and lessees, and will appropriate to his own use, whereby the same will be wholly lost to the plaintiffs, and that said rents and sums of money lost aforesaid are really moneys due, or to become due shortly, to the plaintiffs, who ought to have the same for themselves, and that said defendant John ought not [to] be permitted to collect the same, but a receiver ought to be appointed by the court for that purpose.

And the plaintiffs are informed and verily believe, and
481 upon such information and belief they aver, that the said defendant, John B. Ward, has now in his possession and under his control, and in that of the defendant, Charles H. Cushing, who is his agent, and of his clerks and agents, Jesus Maria Estudillo, Charles T. Harrison, and —— Diven, divers books, papers, accounts, and written evidences and paper writings concerning and relating to said trust property in his hands, or lately so, belonging to the plaintiffs and in relation to and affecting in various ways the rights and interests of the plaintiffs therein, and showing the indebtedness of divers third persons, not parties to this suit, to the plaintiffs, and which the plaintiffs are entitled to examine, and in which they have an interest as being, some of them, the accounts or pretended accounts of the management of their property, and which are necessary to be in the hands of the court in order that a proper
482 settlement and adjustment of said trust may be had, but which are now concealed and kept from the plaintiffs by the contrivance and fraud of the defendant, John B. Ward, and which, or portions of which, important to be examined and understood on the settlement of said trust, they verily believe the said defendant John will destroy, or cause to be destroyed, and which the said defendant ought to be directed to immediately deliver to a receiver, to be appointed herein for the purpose of receiving and preserving the same.

And the pl'ffs aver that they have applied to the said Wm. H. Davis and Maria J. Davis, his wife, and to said Jesus Maria Estudillo to join and unite with them as pl'ffs in this action, but said last-named persons and each of them have refused so to do, wherefore they are made def'ts.

And the plaintiffs aver, and the fact is, that repeated application has been made upon behalf of the plaintiffs to the defendant,
483 John B. Ward, for an account of the said trust property received and possessed by him and of his disposition thereof, but the said defendant has constantly refused and yet refuses to comply with the reasonable requests, and now pretends that he is not bound to account with the plaintiffs touching the said several

matters aforesaid or any of them, and that nothing is due from him to the plaintiffs concerning or touching his management of said trust property, whereas, in, fact, the plaintiffs aver, and the fact is, that if the said defendant John would set forth a true account thereof, as he ought to do, it would appear thereby that, in addition to the lands so held in trust for the plaintiffs, there is a large sum of money, and, as the plaintiffs believe, more than a quarter of a million of dollars in gold coin due from the said defendant, John B. Ward, to the plaintiffs, and the plaintiffs aver that the said
484 defendant John, by his said dishonest actions and doings, *it* become unfit to manage or hold the said trust property, and that he intends to dissipate and destroy and alienate the same, and that he will do so unless restrained by injunction, and that he ought to be so restrained therefrom, and that he ought to be removed from the said trust, and that some proper person ought to be appointed by this honorable court to receive and collect and control the said trust property, under the direction of this court pending this action.

Wherefore the said plaintiffs, being remediless at law in the premises and only relievable in equity where matters of this sort are cognizable, pray that the said defendants may answer the premises; that an account may be taken of all and every the said trust property and effects which have [or], but for the wilful neglect or default of the defendant, John B. Ward, might have been re-
485 ceived by him, the said defendant, or by any other person by his order or to his use, and also on account of his application and appropriation thereof, and that the said defendants may respectfully be decreed to pay to the plaintiffs what shall appear to be due from them or either of them upon such accounting; that the defendant, John B. Ward, may be removed from being any longer the trustee of the plaintiff; that in the meantime some proper person may be appointed to receive and collect said trust estate and effects, and that the defendant, John B. Ward, his agents, servants, and employees, may be restrained pending this action by the order and injunction of this honorable court from any further interference therein or thereabout in any wise.

That the said several deeds of conveyances aforesaid set forth, and which were procured to be made at the instance and by the contrivance of the defendant, John B. Ward, may be decreed
486 to be cancelled and set aside and held for naught, and that the plaintiffs may, by the decree of this court, be restored to their said respective interests therein according to their said respective rights thereto; that the defendant, Francisca La Costa, be decreed to surrender up to the plaintiffs their said premises, and each and every part thereof, and that upon the hearing hereof there be such other and further or different order, judgment, and decree as to equity may seem meet and as the case of the plaintiffs may require, and as in duty bound the plaintiffs will ever pray.

JOHN B. FELTON,
WILSON & CRITTENDEN,
PATTERSON, WALLACE & STOW,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA, } ss:
County of Alameda, }

José Antonio Estudillo, Magdalena Estudillo, and her hus-
487 band, John Nugent, and Juana M. Estudillo, being duly sworn, each for himself and herself, respectively, do depose and say, upon oath, that they have heard the foregoing amended complaint read and know the contents thereof, and that the same is true of their own knowledge, except the matters therein stated on their information and belief, and that as to those matters they believe it to be true.

That the plaintiffs, José Ramon Estudillo, José Vicente Estudillo, and Luis D. Estudillo, are now absent from the county of Alameda and the city and county of San Francisco, and not accessible to these affiants, and are, therefore, unable to verify this complaint; wherefore and for that reason these affiants do verify this complaint as well on behalf of said plaintiffs, José Ramon Estudillo, José Vicente Estudillo, and Luis D. Estudillo, as on behalf of themselves, these affiants.

JOSÉ A. ESTUDILLO.
MAGDALENA NUGENT.
JOHN NUGENT.
JUANA M. ESTUDILLO.

Sworn to and subscribed before me this first day of April, 1869, by José A. Estudillo, Magdalena Nugent, John Nugent, Juana M. Estudillo.

J. A. AMERMAN, *Co. Clerk,*
By A. A. MOORE, *Deputy.*

488 "EXHIBIT A."

Trust Deed and Power of Attorney.

Juana Ma. Estudillo and others to John B. Ward.

This indenture made this 15th day of December, in the year one thousand eight hundred and fifty-eight, between Juana M. Estudillo, José R. Estudillo, José Antonio Estudillo, José Vicente Estudillo, José Louis Estudillo, Dolores Estudillo, parties of the first part, and John B. Ward, party of the second part.

Whereas the said parties of the first part are respectively owners of and well entitled to certain estates and interests in and to that tract of land situate in the township of Eden, county of Alameda, and State of California, known as the rancho of San Leandro and bounded as follows: northerly by the creek of San Leandro, easterly
489 by [the] ranch of Guilermo Castro, common-y called the ranch of San Lorenzo, southerly by the creek of San Lorenzo, westerly by the Bay of San Francisco, being the same land granted to José Joaquin Estudillo by Don Juan B. Alvarado, and are desirous of placing the same under the control and management of said party of the second part for their benefit in proportion to their respective interests therein, and are also desirous of clothing the party of the

second party with full power to act for them and each of them in respect to said land, and to all other matters in which they have had or now have any interest; and whereas the said land and premises are now subject to certain mortgages and incumbrances:

Now, this indenture witnesseth that the said parties of the first part, for and in consideration of the recited premises and for and in consideration of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have, and each of them has, granted, bargained, sold, assigned,
490 and transferred, and by these presents do grant, bargain, sell, assign, and transfer, to the said party of the second part, his heirs and assigns, forever, all and singular their and each of their right, title, interest, estate, property, possession, claim and demand of, in, to, or out of the said land and premises hereinbefore described and every part thereof, and the reservation and reservations, remainder and remainders, rents, issues, and profits thereof, with the appurtenances.

To have and to hold the same to the said party of the second part, his heirs and assigns, forever, in trust, nevertheless, and to, for, and upon the several and respective trusts, uses, intents, and purposes hereinafter mentioned and declared of and concerning the same—that is to say:

First. At the discretion of the said party of the second part, and in his name to grant, bargain, sell, assign, and convey the same, or any part thereof, to any person or persons desirous to purchase
491 the same; also to pledge the same, or any part thereof, by mortgage or mortgages in his own name; also to lease and farm let the same, or any part thereof, in his own name.

Second. From and out of the proceeds of sale, mortgage, or lease, or other mode from out of said premises, to pay, satisfy, and discharge all and every charge incurred by the management of said property, and all and every debt or incumbrance or mortgage on the same, or any of the estate or interest of said parties of the first part therein.

Third. Upon the further trust in reference thereto to account to the said parties of the first part, and each of them, in proportion to their several and respective interests, for all and every sum or sums of money received or realized by the said party of the second part from any sale or mortgage or lease of said premises, or any part thereof, and to pay to the said parties of the first part, respec-
492 tively, in proportion to their several estates and interests, all sum or sums of money that may be due or owing to them, or any of them, from the proceeds of any such sale, mortgage, lease, or otherwise howsoever of or from said premises; and, lastly, whenever and as soon as all debts or claims or incumbrances upon the interests of said parties of the first part in said premises shall be satisfied and discharged, and at the request of said parties of the first part or any of them, respectively, to reconvey to the said parties of the first part, their heirs and assigns, all of the estate or interest in the same, respectively, hereby conveyed to *to* the said party of the second part that may be then remaining, and it is hereby expressly

declared and provided that no person or persons who shall purchase or lease from said party of the second part any portion of said premises hereby conveyed to him, and that no person or persons
493 who shall loan or advance any sum or sums of money by way of mortgage on said premises, or any part thereof, to said party of the second part, shall be deemed or held in any manner responsible for the application by said party of the second part of the purchase-money or rents or money loaned or advanced to him in accordance with the trust hereby created.

The said parties of the first part hereby consenting and agreeing to look to and hold the said party of the second part alone, and no other, under said trust for their respective interests in said moneys, and the said parties of the first part jointly and severally do hereby make, ordain, authorize and appoint the said party of the second part their and each of their true and lawful attorney-in-fact, for them and each of them, to ask, demand, sue for, recover, and receive all and every sum or sums of money or other thing of and from all and any person or persons indebted to them or either
494 of them, and to settle up and close all business in which they or either of them have any interest and to settle with William H. Davis of and concerning all and every matter and thing whatsoever affecting real or personal property, or of what nature or kind soever, at any time heretofore or now existing between said parties of the first part, or any of them, and said William H. Davis, and relating to or arising out of the estate of the late José Joaquin Estudillo, or of the executorship or administration of said William H. Davis therein, out of any proceedings had or thing done by said William H. Davis, alone or jointly with any other person or persons, as attorney-in-fact for said parties of the first part or any of them, or on account of or arising out of any and all other matters and things whatsoever, and to attribute or refer all matters in difference that have arisen or may hereafter arise between the said par-
495 ties of the first part, or any of them, and said William H. Davis, or any other person or persons, and to bring and defend all and any suit or suits in our, or any of our, names which in the opinion of the said party of the second part is for the interest of the said parties of the first [part], or any of them, and to sue for and recover possession of all and every part of said land and premises now held or which may hereafter be held by any person or persons against the parties of the first part, or any of them, and for and in the names of said parties of the first part, and each of them, to contract for an extension of and to extend the time or times of payment of any sum or sums of money due or to become due by said parties of the first part, or either of them, and whether secured or not secured on said premises aforesaid, and for and in the names of said parties of the first part, from time to time, as in the discretion of the said party of the second part may be required, to borrow money on the
496 best terms that may be obtained for the same, and on any of the occasions aforesaid, in the name of said parties of the first part, or any of them, notes, bonds, or other securities for the same

to give, and from time to time to renew, and for and in the names of said parties of the first part, and each of them, all deeds, leases, mortgages, notes, bonds, receipts, acknowledgments, orders of reference, and other documents whatsoever required in said premises, to make, sign, seal, acknowledge, and deliver and renew, and generally to do all and every thing which said parties of the first part could do if personally present and acting therein, hereby ratifying and confirming all and whatsoever the said party of the second part shall lawfully do or cause to be done in the premises, as such attorney-in-fact, by virtue of these presents; and the said parties of the first part, jointly and severally, have revoked, recalled,
497 and countermanded, and by these presents do revoke, recall, and countermand, and to all intents and purposes make null and void and of none effect, all and every letter or letters of attorney heretofore by said parties of the first part, or any of them, made to said William H. Davis alone, or to said William H. Davis jointly or severally with said John B. Ward or any other person, and all powers and authorities in said letter or letters contained.

In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JUANA M. DSTUDILLO. [SEAL.]
JOSÉ R. ESTUDILLO. [SEAL.]
JOSÉ ANTO. ESTUDILLO. [SEAL.]
JOSÉ VICENTE ESTUDILLO. [SEAL.]
LUIS ESTUDILLO. [SEAL.]
DOLORES ESTUDILLO. [SEAL.]

STATE OF CALIFORNIA, } *ss:*
County of Alameda, }

On the sixteenth day of December, A. D. one thousand eight
498 hundred and fifty-eight, before me, Horace M. Vesey, a county recorder in and for said county, personally appeared Louis Estudillo, to me personally known to be the individual described in and who executed the within instrument, and acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] H. M. VESEY,
County Recorder.

STATE OF CALIFORNIA, } *ss:*
County of Contra Costa, }

On this fifteenth day of December, A. D. one thousand eight and fifty-eight, before me, E. F. Weld, a notary public in and for said county, personally appeared Juana M. Estudillo, José R. Estudillo, José Anto. Estudillo, and José Vicente Estudillo, to me
499 personally known to be the individuals described in and who executed the within instrument, and they severally acknowl-

edged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.] E. F. WELD,
Notary Public.

STATE OF CALIFORNIA, } ss:
County of Alameda, }

On this twelfth day of March, A. D. one thousand eight hundred and fifty-nine, before me, Edward S. Chipman, a notary public in and for said Alameda county, residing therein, duly commissioned and sworn, personally appeared the within-named Dolores Estudillo, whose name is subscribed to the annexed instrument as a party thereto, and personally known to me to be the individual de-
500 scribed in and who executed the said annexed instrument and subscribed her name thereto, and the said Dolores Estudillo duly acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in the said county of Alameda, the day and year last above written.

[SEAL.] EDWARD S. CHIPMAN,
Notary Public.

Filed for record, at request of John B. Ward, March 14, 1859, at 10 o'clock a. m., and recorded March 15, 1859, at 9¾ o'clock a. m.

H. M. VESEY,
County Recorder,
Per NAT. RENNIE,
Deputy Recorder.

STATE OF CALIFORNIA, } ss:
County of Alameda, }

I, Isaac A. Amerman, county recorder in and for said county,
501 do hereby certify the annexed to be a full, true, and correct transcript of the record of an instrument as the same is recorded in my office in book H of deeds, page 694, &c.

In testimony whereof I have hereunto set my hand and affixed my official seal this 1st day of May, A. D. 1868.

I. A. AMERMAN, *Recorder,*
By T. W. JOSSELYN,
Deputy Recorder.

"EXHIBIT B."

Juana M. Estudillo to Maria Concepcion A. Ward.

This indenture, made the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and sixty-three, between Juana M. Estudillo, of the counties of Alameda and Contra Costa, State of California, party of the first part, and Maria Concep-
502 cion A. Ward, wife of John B. Ward, of said county of Alameda, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the natural love and affection which she, the said party of the first part, bears to said party of the second part, has given, granted, bargained, sold, remised, and quit-claimed, and by these presents does give, grant, bargain, sell, remise, convey, and quit-claim, unto the said party of the second part, and to her heirs and assigns, forever, all the right, title, and interest of the said party of the first part in and to that certain tract of land situate in the township of Eden, of said county of Alameda, known as the rancho of San Leandro, and bounded as follows: Northerly by the creek of the San Leandro, easterly by the rancho of Guillermo Castro, commonly called the ranch of San Lorenzo; southerly by the creek of San Lorenzo, and westerly by the Bay of San Francisco, being the same land granted to José Joaquin Estudillo by Don Juan B. Alvarado,
503 Governor of California, together with all and singular the temements, hereditaments, any appurtenances thereunto belonging, and the rents, issues, and profits thereof.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second party, her heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set her hand and seal the day and year first above written.

JUANA M. ESTUDILLO. [SEAL.]

WITNESS: The words "sum of" and "dollars, lawful money of the United States of America to — in hand paid, the receipt whereof is hereby acknowledged," erased on the eighth and — lines, and the words "given" and "given" inserted in the tenth line before execution.

Witness. A. F. DYER.

[U. S. rev. stamp 50 cents.]

504 STATE OF CALIFORNIA, } *ss:*
County of Alameda, }

On this twenty-seventh day of March, A. D. one thousand eight hundred and sixty-three, before me, Benjamin F. Ferris, a notary public in and for said Alameda county, personally appeared A. F. Dyer, personally known to me to be the same person whose name is subscribed to the annexed instrument as a witness thereto, who, being by me duly sworn, deposed and said that he resides in Contra Costa county; that he was present and saw Juana M. Estudillo, known to him to be the same person described in and who executed the annexed instrument as a party thereto, sign, seal, and deliver the same; and that the said Juana M. Estudillo acknowledged in the presence of deponent that she executed the same freely and voluntarily and for the uses and purposes therein mentioned; and that he, the deponent, thereupon subscribed his name as subscrib-
505 ing witness thereto.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in the certificate first above written.

[SEAL.] B. F. FERRIS,
Notary Public.

Recorded, at request of grantee, March 28th, 1863, at 10½ o'clock a. m.

A. M. CHURCH, *Recorder*,
By G. E. SMITH, *Deputy*.

STATE OF CALIFORNIA, } ss:
County of Alameda, }

I, Isaac A. Amerman, county recorder in and for said county, do hereby certify the annexed to be a true, full, and correct transcript of the record of an instrument as the same is recorded in my office in Book N of deeds, pages 523 and 524.

In testimony whereof I have hereunto set my hand and affixed my official seal this 29th day of May, A. D. 1868.

[U. S. rev. stamp, 5 cents, cancelled.]

I. A. AMERMAN, *Recorder*,
By J. M. JOSSELYN, *Deputy Recorder*.

506 "EXHIBIT C."

José A. Estudillo to Juana M. Estudillo.

This indenture, made this twenty-third day of April, in the year one thousand eight hundred and sixty-four, between José Antonio Estudillo, of the county of Alameda, State of California, party of the first part, and Juana M. Estudillo, of the same county and State, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of ten thousand dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold aliened, remised, released, conveyed, and confirmed, and by these presents does grant, bar-
507 gain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to her heirs and assigns, forever, all his right, title, and interest in and to that certain tract of land situate in the county of Alameda, State of California, bounded on the southeast by the San Lorenzo creek, and by a line commencing on the San Lorenzo creek at the southwesterly corner of land now occupied — J. McMurtry; thence running northerly along said westerly line and in the same straight line until reaching the centre of the new county road leading from San Leandro to Hayward's; thence in a straight line and northeasterly direct to a point forming the northwesterly corner of [the] foundations of an old adobe house formerly occupied by the Indian Sylvester, now deceased; thence in a straight line northwesterly, passing through the centre of the *laguna*, or small lake, between the hills
to San Leandro creek; on the north by San Leandro creek,
508 and the west by the Bay of San Francisco; on the south by the San Lorenzo creek, being the land known as the rancho San Leandro; and the interest hereby conveyed being the same derived by the party of the first part as one of the heirs of José Joa-

quin Estudillo, deceased, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, homestead property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the above-described premises and every part and parcel thereof, with the appurtenances, to have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the
509 second part, her heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOSÉ A. ESTUDILLO. [SEAL.]

Signed, sealed, and delivered in the presence of—
G. E. SMITH.

[U. S. rev. S. $10.00. J. A.E., April 23d, 1864.]

STATE OF CALIFORNIA, } *ss:*
County of Alameda, }

On this twenty-third day of April, A. D. one thousand eight hundred and sixty-four, before me, A. M. Church, county clerk and *ex-officio* clerk of the county court in and for said county, personally appeared José A. Estudillo, to me personally known *to me* to be the individual described in and who executed the annexed instrument, and acknowledged to me that he executed the same freely
510 and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed the seal of said court the day and year in this certificate first above written.

[SEAL.]

A. M. CHURCH, *Clerk,*
By G. E. SMITH, *Deputy.*

Recorded, at request of John B. Ward, April 23d, 1864, at 5 o'clock p. m.

A. M. CHURCH, *Recorder,*
By G. E. SMITH, *Deputy.*

STATE OF CALIFORNIA, } *ss:*
County of Alameda, }

I, Isaac A. Amerman, county recorder in and for said county, do hereby certify the *the* annexed to be a true, full, and correct transcript of the record of an instrument, as the same is recorded in my office, in book Q of deeds, pages 89, 90, & 91.

In testimony whereof I have hereunto set my hand and affixed my official seal this twenty-eighth day of April, A. D. 1868.

I. A. AMERMAN, *Recorder.*
By J. M. JOSSELYN, *Dep. Recorder.*

[Internal rev. stamp, 5c. Cancelled April 28, 1868.]

511 "EXHIBIT D."

[U. S. rev. stamp, 80c. J. M. E., Aug. 17th, 1864.]

Juana M. Estudillo to John B. Ward.

This indenture, made the sixteenth day of August, A. D. one thousand eight hundred and sixty-four, between Juana M. Estudillo, of the county of Alameda and State of California, party of the first part, and John B. Ward, of the same county and State, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of eighty thousand dollars, in the current gold coin of the United States of America, to her in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has
512 granted, bargained and sold, conveyed, and confirmed, and by these presents does grant, bargain and sell, convey, and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all the right, title, interest, property, and estate of said party of the first part in and to those certain four ranches, tracts, and parcels of land bounded and described as follows, to wit:

First. All that ranch, tract, or piece of land situate, lying, and being in the county of Alameda, State of California, bounded and described as follows, to wit: On the southeast by the San Lorenzo creek and by line commencing on the San Lorenzo creek at the southwesterly corner of a tract of land formerly (in the year 1861) occupied by J. McMurtry; thence running westerly along said westerly line and in the same straight until reaching the centre of county road leading from San Leandro to Wm. Hayward's; thence
513 in a straight line and northeasterly direct to a point forming the northwesterly corner of the foundation of an old adobe house, formerly occupied by the Indian Sylvestro, long since deceased; thence in a straight line northwesterly, passing through the centre of the *laguna*, or small lake, between the hills, to the San Leandro creek; on the north by the San Leandro creek, and on the west by the Bay of San Francisco, and on the south by the San Lorenzo creek, being the rancho known as the San Leandro rancho, heretofore granted by the Mexican government to José Joaquin Estudillo in his lifetime, now deceased.

Second. The rancho or tract of land situated in the county of Santa Barbara, State of California, known as the Guadalupe rancho, being the same land which was granted to Diego Olivera and Teodora Arellones by J. B. Alvarado, Governor of California, on the 21st day of March, A. D. 1840, and which was confirmed to said Diego Olivera and Teodora Arellones by the board of com-
514 missioners to ascertain and settle private land claims in the State of California on the sixth day of *of* December, A. D. 1853, and more particularly described as follows, viz: Commencing at the sand hills (meganos), which are at the place called the mouth of the Arroyoso flaco, and running thence eastward the distance of two and one-half (2½) leagues to the road which ascends to the Mesa de Niponeo, where there is a stake; thence running over Llano de

Largo in a southerly direction the distance of three (3) leagues to the high part of the Sulphur Hills (Lomas de Azufra), to an oak tree, the most easily distinguished; thence running over the same hills in a southerly direction the distance of one league and a quarter (1¼) to the seashore, where there is a morito, and thence running over a cañada the distance of two and one-half (2½) leagues to the place of beginning, and the same land which is described in
515 the map or plan of survey of said "Guadalupe rancho," made by J. E. Terrell in September, A. D. 1860, and now on file in the office of the United States surveyor general for California.

Third. The rancho, a tract of land situate in the county of Santa Barbara, State of California, and known as the Cosmolia rancho, being the same land which was granted to Antonio Olivera by J. B. Alvardo, Governor of California, on the twelfth day of September, A. D. 1840, and which was confirmed to said Antonio Olivera by the board of commissioners to ascertain and settle private land claims in the State of California, on the sixth day of March, A. D. 1835, excepting and reserving therefrom that part thereof which was conveyed by A. M. Olivera and wife to S. T. Burton on the 29th day of September, 1855, said Cosmolio rancho being more particularly described in a map or plan of survey thereof made in September, A. D. 1860, by J. E. Terrell, and now on file in the office
516 of the United States surveyor general for the State of California.

Fourth. Rancho, a tract of land situate in the county of Santa Barbara, State of California, known as "El Cajo" or "Punta de la Concepcion" rancho, being the same land which was granted to Anastacio Carillo by J. B. Alvarado, Governor of California, on the 10th day of May, A. D. 1837, excepting and reserving therefrom that part thereof which was conveyed by A. Cavillo and wife to Isaac J. Sparks on the 13th day of October, A. D. 1851, said "El Cajo" or Punta de la Concepcion rancho being more particularly described in a map or plan of survey made in November, A. D. 1860, by J. E. Terrell, and now on file in the office of the United States surveyor general for the State of California; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits
517 thereof, and also all the estate, right, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above-described premises and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of second part, his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

JUANA M. ESTUDILLO. [SEAL.]

Signed, sealed, and delivered in the presence of—
A. M. CHURCH.

(The word- "and known," in 2d line of description "third" tract interlined before signing. The word "four," in 13th line from the top of page, interlined before signing.)

518 STATE OF CALIFORNIA, } ss:
County of Alameda, }

On this seventeenth day of August, A. D. one thousand eight hundred and sixty-four, before me, A. M. Church, county clerk in and for said county, personally appeared James M. Estudillo, personally known to me to be the individual described in and who executed the annexed instrument, and acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed the seal of said court, the day and year in this certificate first above written.

[SEAL.] A. M. CHURCH,
County Clerk.

Recorded at request of J. B. Ward August 17, A. D. 1867, at 45 minutes past 4 p. m.

A. M. CHURCH, *Recorder,*
By A. C. CRANE, *Deputy.*

519 STATE OF CALIFORNIA, } ss:
County of Alameda, }

I, Isaac A. Amerman, county recorder in and for said county, do hereby certify the annexed to be a true, full, and correct transcript of the record of an instrument as the same is recorded in my office in Book P of Deeds, page 681, &c.

In testimony whereof I have hereunto set my hand and affixed my official seal this 1st day of May, A. D. 1868.

I. A. AMERMAN, *Recorder,*
By J. W. JOSSELYN, *Deputy Recorder.*

[U. S. rev. stamp, 5 cents, cancelled.]

"EXHIBIT E."

[U. S. rev. stamp, 50 cents. J. B. W. & M. C. A. W., Jan. 25th, 1865.]

John B. Maro and wife to Chas. H. Cushing.

520 This indenture, made this twenty-fifth day of January, in the year one thousand eight hundred and sixty-five, between John B. Ward and Maria Concepcion A. Ward, his wife, of the town of San Leandro, county of Alameda, parties of the first part, and Chas. H. Cushing, of the same town and county, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, delivered, remised, re-

leased, conveyed, and confirmed, and by these presents do grant, bargain sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all that right, title, and interest in and to the rancho of San
521 Leandro, county of Alameda, which was conveyed by Juano M. Estudillo to Maria Concepcion A. Ward by deed dated March 25th, 1863, recorded in Book N of Deeds, folio 523, in the recorder's office of said county of Alameda, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsover, as well in law as in equity, of the said parties of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

522 In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written

JOHN B. WARD. [SEAL.]
MARIA CONCEP'N A. WARD. [SEAL.]

Signed, sealed, and delivered in the presence of—
N. HAMILTON.

(The words which *was* on the thirteenth line, before "conveyed," interlined before acknowledgment.)

STATE OF CALIFORNIA, } *ss:*
County of Alameda, }

On the thirtieth day of January, A. D. one thousand eight hundred and sixty-five, before me, N. Hamilton, county judge of said county, personally appeared John B. Ward and Maria Concepcion A. Ward, his wife, both personally known to me to be the individuals described in and who executed the annexed instrument as parties thereto, and acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein
523 mentioned; and the said Maria Concepcion A. Ward, wife of the said John B. Ward, having been by me first made acquainted with the contents of said instrument, acknowledged to me, on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence by her husband, and that she did not wish to retract the execution of the same.

In witness whereof I have hereunto affixed my hand and caused to be affixed the seal of said court, in this county, the day and year in this certificate first above written.

[SEAL.]

N. HAMILTON,
County Judge.

Attest:

A. M. CHURCH, *Clerk*,
By G. E. SMITH, *Deputy.*

Recorded at request of John B. Ward, January 30, 1865, at 11.50 o'clock a. m.

A. M. CHURCH, *Recorder*,
By G. E. SMITH, *Deputy*.

524 STATE OF CALIFORNIA, } ss:
County of Alameda, }

I, Isaac A. Amerman, county recorder in and for said county, do hereby certify the annexed to be a true, full, and correct copy transcript of the record of an instrument as the same is recorded in my office in Book S of Deeds, page 36, &c.

In testimony whereof I have hereunto set my hand and affixed my official seal this 25th day of May, A. D. 1868.

[U. S. rev. stamp, 5 cents, cancelled.]

I. A. AMERMAN, *Recorder*,
By J. W. JOSSELYN,
Deputy Recorder.

"EXHIBIT F."

[U. S. rev. stamp, 50c., cancelled Jan. 25, 1865.]

Charles H. Cushing to John B. Ward.

525 This indenture, made the 25th day of January, in the year one thousand eight hundred and sixty-five, between Chas. H. Cushing, of the town of San Leandro, county of Alameda, party of the first part, and John B. Ward, of the same town and county, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns, forever, in and to the right, title, and interest in and to the rancho of San Leandro, county of Alameda, conveyed by,
526 or which was intended to be conveyed by, said John B. Ward and Maria Concepcion A. Ward, his wife, to the said party hereto of the first part by deed bearing even date, and to be recorded simultaneously herewith, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first party of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part has here-
527 unto set his hand and seal the day and year first above written.

CHAS. H. CUSHING. [SEAL.]

Signed, sealed, and delivered in the presence of—
G. E. SMITH.

STATE OF CALIFORNIA, } ss:
County of Alameda, }

On the thirtieth day of January, A. D. one thousand eight hundred and sixty-five, before me, A. M. Church, county clerk and *ex-officio* clerk of the county court in and for said county, personally appeared Chas. H. Cushing, personally known to me to be the individual described in and who executed the annexed instrument, and acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed the seal of said court, in this county, the day and year in this certificate first above written.

[SEAL.] A. M. CHURCH, *Clerk,*
By G. E. SMITH, *Deputy.*

528 Recorded at the request of John B. Ward, Jan. 30, 1865, 11.55 o'clock a. m.

A. M. CHURCH, *Recorder,*
By G. E. SMITH, *Deputy.*

STATE OF CALIFORNIA, } ss:
County of Alameda, }

I, Isaac A. Amerman, county recorder in and for said county, do hereby certify the annexed to be a true, full, and correct transcript of the record of an instrument as the same is of record in my office in Book S of Deeds, pages 38, &c.

In testimony whereof I have hereunto set my hand and affixed my official seal this 25th day of May, A. D. 1868.

I. A. AMERMAN, *Recorder,*
By J. W. JOSSELYN, *Dep. Recorder.*

[Internal rev. stamp, 5c., canceled.]

529 "EXHIBIT G."

[U. S. rev. stamp, $1.00. J. B. W., Nov. 5th, 1866.]

John B. Ward *et als.* to John C. Pelton (in trust).

This indenture, made the fifth day of November, in the year of our Lord eighteen hundred [and] sixty-six, between John B. Ward, as trustee for John Nugent and Magdalena Nugent, his wife, and Dolores Estudillo, now wife of C. H. Cushing; John B. Ward and Concepcion A. Ward, his wife, parties of the first part, and John C. Pelton, in trust for Nancy Malvina Pelton, and John C. Pelton, Jr.,

party of the second part, for and in consideration of the sum of six hundred dollars, in the gold coin of the United States of America, to them in hand paid by the said party of the second — at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, conveyed,
530 and confirmed, and by these presents do grant, bargain, and sell, convey, and confirm unto the said party of the second part, and to his heirs and assignees, forever, all that certain piece or parcel of land situated in the county of Alameda, State of California, being a part of the rancho of San Leandro, beginning at a stake on the north side of Callan avenue and where it intersects the westerly side of Huff's twenty-acre tract; thence at right angles along the north side of Callan avenue 150 feet; thence at right angles about 500 feet to the centre of the San Leandro creek; thence along the centre of said creek 153 feet to where it intersects S. Huff's northwesterly line; thence along said line about 500 feet to the place of beginning, containing about one acre and a half, more or less, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and
531 the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, and interest, homestead property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs, and assigns, forever.

In witness whereof said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN B. WARD. [SEAL.]
JOHN B. WARD, *Trustee.* [SEAL.]
CONCEPCION A. WARD. [SEAL.]

Signed, sealed, and delivered in presence of—

——.

532 STATE OF CALIFORNIA, } ss:
County of Alameda, }

On this fifth day of November, A. D. one thousand eight hundred and sixty-six, before me, G. Estabrook Smith, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared John B. Ward and Concepcion A. Ward, his wife, whose names are subscribed to the annexed instrument as parties thereto, severally known to me to be the same persons described in and who executed the within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned, and the said Concepcion A. Ward, wife of the said John B Ward, who is personally known to me to be the person whose name is subscribed to the annexed instrument as a party thereto, having been by me

made acquainted with the contents of such instrument, duly
533 acknowledged to me, on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, and for the uses and purposes therein mentioned, without fear, compulsion, or undue influence of her husband, and that she did not wish to retract the execution of the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in said county, the day and year in this certificate first above written.

[SEAL.] G. ESTABROOK SMITH,
Notary Public.

STATE OF CALIFORNIA, } *ss:*
County of Alameda, }

On this fifth day of November, A. D. one thousand eight hundred and sixty-six, before me, G. Estabrook Smith, a notary public in and for said Alameda county, duly commissioned and sworn,
534 personally appeared the within-named John B. Ward, as trustee for John Nugent and Magdalena Nugent, his wife, and Dolores Estudillo, now wife of C. H. Cushing, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the individuals described in and who executed the said annexed instrument, and the said John B. Ward acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned as such trustee as aforesaid.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL,] G. ESTABROOK SMITH,
Notary Public.

STATE OF CALIFORNIA, } *ss:*
County of Alameda, }

I, Isaac A. Amerman, county recorder in and for said
535 county, do hereby certify the annexed to be a true, full, and correct transcript of the record of an instrument, as the same is recorded in my office, in Book W of Deeds, page 290, &c.

In testimony whereof I have hereunto set my hand and affixed my official seal, this 30th day of May, A. D. 1868.

I. A. AMERMAN, *Recorder,*
By J. W. JOSSELYN,
Dep. Recorder.

[Internal rev. stamp, 5c. Canceled.]

"EXHIBIT H."

[U. S. rev. stamp, $5.00. J. B. W. July 27, 1866.]

John B. Ward *et als.* to Dolores E. Cushing. Gift.

This indenture, made the twenty-seventh day of July, in
536 the year of our Lord one thousand eight hundred and sixty-six, between John B. Ward, as trustee for John Nugent and Magdelena Nugent, his wife, and Dolores Estudillo, now

wife of Charles H. Cushing; John B. Ward and Concepcion A. Ward, his wife, of the town of San Leandro, county of Alameda, State of California, parties of the first part, and Dolores Estudillo, now wife of Charles H. Cushing, of the town, county, and State aforesaid, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the love and affection which they, the said parties of the first part, hath and beareth unto Dolores E. Cushing, the said party of the second part, as also for the better support, maintainance, and protection of the said party of the second part, hath given, granted, aliened, enfeo-fed, and confirmed, and by these presents do give, grant, alien, enfeof-, and confirm, unto the said party of the second part
537 and to her heirs and assigns, forever, all that certain piece or parcel of land being and situated in the county of Alameda, State of California, being a portion of the rancho of San Leandro, bounded and described as follows, viz: Beginning at a stake on the southwesterly line (continued) of Watkins street, San Leandro, being the easterly corner of fifty acres of land heretofore sold to William Cahill; thence along said Watkins street continued south 27¾ degrees, east 15.42 chains to a stake; thence, at right angles and parallel with said Cahill's southwesterly line, south 62¼ degrees, west 32.42 chains to a stake; thence, parallel with said Watkins street, continued north 27¾ degrees, west 15.42 chains to said Cahill's southerly corner; thence along said Cahill's southeasterly line north 62¼ degrees, east 32.42 chains to the place of beginning, containing fifty (50) acres, together with all and singular the tenements,
538 hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, homestead, property, possession, claims, and demand whatsoever, as well in law as in equity, of the said parties of the first part, in and to the above-described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns, forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN B. WARD, *Trustee.* [SEAL.]
CONCEP'N A. WARD. [SEAL.]
JOHN B. WARD. [SEAL.]

Signed, sealed, and delivered in presence of—
G. E. SMITH.

539 STATE OF CALIFORNIA, } ss:
County of Alameda, }

On this 27th day of July, A. D. one thousand eight hundred and sixty-six, before me, G. Estabrook Smith, a notary public in and for said Alameda county, duly commissioned and sworn, personally appeared the within-named John B. Ward, as trustee for John Nugent

and Magdalena Nugent, his wife, and Dolores Estudillo (now wife of Charles H. Cushing), whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the individual described in and who executed the said annexed instrument, and said John B. Ward, as trustee, acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned as such trustee as aforesaid.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.] G. ESTABROOK SMITH,
Notary Public.

540 STATE OF CALIFORNIA, } ss:
County of Alameda, }

On this twenty-seventh day of July, A. D. one thousand eight hundred and sixty-six, before me, G. Estabrook Smith, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared John B. Ward and Concepcion A. Ward, his wife, whose names are subscribed to the annexed instrument as parties thereto, severally personally known to me to be the same persons described in and who executed the within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned; and the said Conception A. Ward, wife of said John B. Ward, who is personally known to me to be the person whose name is subscribed to the annexed instrument as a party thereto, having been by me made acquainted with the contents of such in-
541 struments, duly acknowledged, on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily and for the uses and purposes therein mentioned, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in said county, the day and year in this certificate first above written.

[SEAL.] G. ESTABROOK SMITH.
Notary Public.

Recorded, at request of Richard Tobin, August 1st, 1866, at 55 minutes past 7 o'clock a. m.

I. AMERMAN, *Recorder,*
By N. W. PALMER, *Deputy.*

542 STATE OF CALIFORNIA, } ss:
County of Alameda, }

I, Isaac Amerman, county recorder in and for said county, do hereby certify the annexed to be a true, full, and correct transcript of the record of an instrument, as the same is recorded in my office in Book V of Deeds, pages 354, &c.

In testimony whereof I have hereunto set my hand and affixed my official seal this 25th day of May, A. D. 1868.

I. A. AMERMAN, *Recorder*,
By J. W. JOSELYN,
Deputy Recorder.

(Endorsed:) Filed April 1st, 1869. I. A. Amerman, clerk, by A. A. Moore, deputy.

543 RESPONDENT'S EXHIBIT 19.

Action for Foreclosure of Mortgage.

In the Circuit Court of the Third Judicial District of the County of Alameda, State of California.

HIBERNIA SAVINGS AND LOAN SOCIETY, Pl'ff,
vs.
JOHN B. WARD *et al.*, Def'ts.

The complaint sets forth that John B. Ward and wife borrowed $125,000.00 in gold coin on the 11th day of April, A. D. 1866, of the plaintiff. Defendant John B. Ward gave a promissory note for the payment of the same, dated the 11th of April, 1866, payable 6 years after date, bearing interest at the rate of one per cent. per month in advance, compounding monthly, and a copy of which is annexed to the complaint.

544 Alleges that John B. Ward and wife gave a mortgage to secure the payment of the note on the same day of certain lands described in the complaint, viz., San Leandro rancho, excepting part of town of San Leandro (part of block 2, San Leandro), Guadalupe rancho, Cosmolia rancho.

Alleges that defendant-, John B. Ward and wife, Concepcion borrowed a second sum of 50,000 in gold coin on the 22d day of April, 1868, and defendant, John B. Ward, gave his note to secure the same, with interest at one per cent. per month, compounding monthly, and defendants, John B. Ward and wife, gave a mortgage the same day to secure the said note of certain lands above described.

Alleges that defendants promised to pay off all liens, taxes, etc., on mortgaged premises, and that if plaintiff paid any of these taxes, mortgages, etc., he should be allowed interest on the money

545 thus advanced, at the rate of two per cent. per month from the several dates until paid, and in case of non-payment of interest or breach of covenant, [the] principal sum should, at option of plaintiff, immediately become due and suit to foreclose be commenced, and 10% counsel fees be allowed. The mortgagors, John B. Ward and wife, agreed that if by their default it should be necessary for plaintiff to bring suit for the recovery for the two mortgages that 5% on the amount due should be allowed for counsel fees, whether a decree of foreclosure should be entered or not.

Mortgagors further agreed in each of their mortgages with plaintiff that in case of a foreclosure a receiver should be appointed by the court having jurisdiction of the case, with full powers to collect

the rents and profits of the premises until sold under foreclosure, and apply such rents for the payment of any deficiency.

Further alleges that said mortgages were recorded, and that
546 it still holds said mortgages, and that defendants have failed to pay the moneys due upon their notes, or any part thereof, accruing since the 11th day of November, 1867, and that the entire principal sums mentioned in said notes, less $18,094.94, paid on account before the 6th day of Feb'y, 1867, are due and unpaid.

Further alleges that Concepcion A. Ward died leaving a will which has been duly admitted to probate, &c.

Further alleges that the interests of the additional defendants (enumerated in complaint) are subsequent to plaintiff's said mortgages. Plaintiff therefore prays the intervention of [the] court, and that a receiver be appointed, &c.

(Verified by Edward Martin, sec'y of [the] bank, in usual form, on the 18 day of February, A. D. 1870.

(EXHIBIT A.)

The first note payable six years after date without grace.

547 (EXHIBIT B.)

The second note upon similar terms as the first.

Complaint filed February 19th, 1870.

Demurrers, &c.

March 3d, 1870, Wm. H. Patterson, attorney for José Antonio Estudillo, a defendant herein, demurred to a portion of the complaint concerning $\frac{1}{18}$ of the rancho San Leandro.

March 3d, 1870, John Nugent, by said Patterson, his attorney, demurred to the complaint, setting forth twelve different grounds of demurrer.

On the 11th day of March, 1870, Richard Tobin, plaintiff's attorney, demurred to José Antonio Estudillo's defense.

March 23d, 1870, Thos. W. Mulford made a separate answer to the complaint, by Theodore H. Hittell, his attorney.

April 20th, 1870, J. M. Estudillo, by J. B. Felton, his attorney, demurred to the complaint.

June 29th, 1870, Theodore Le Roy, by John B. Felton, his attorney, gave notice of motion to set aside the summons and
548 service thereof on said Le Roy; service of notice admitted June 20th, 1870.

June 20, 1870, order made by Judge McKee extending defendant Le Roy's time to plead until July 5th, 1870.

July 5th, 1870, L. S. Robinson, by John B. Felton, filed a demurrer to the complaint.

October 11th, 1870, it was stipulated between the parties to release two certain parcels of land particularly described therein, both parcels being situated in Alameda county. This stipulation was filed May 8th, 1871.

The suit was dismissed May 20th, 1871; papers, &c., of dismissal filed May 29th, 1874.

549 RESPONDENT'S EXHIBIT 20.

Statement Showing the Amounts Received to the Credit of the Judgment in Le Roy vs. *Estudillo & al., and the Amount of the Deficiency.*

	Amount found due by decree	$766,577 00
	Costs of suit	1,500 00
1879.		
Jan'y 10.	Amount of judgment	$768,077 00
1880.		
April 17.	Interest at 7 per ct. per annum from Jan'y 10, 1879	68,252 00
		$836,329 00
April 17.	Amount paid plaintiff by Benjamin H. Brooks, commissioner	157,242 42
" "	Deficiency	$679,086 58
May 1.	Amount paid plaintiff by Robert L. McKee, commissioner	474,774 93
	Deficiency	$204,311 65
May 1.	Amount acknowledged to have been received by plaintiff	36,797 23
	Deficiency	$167,514 42

550 RESPONDENT'S EXHIBIT 21.

Statement Showing the Amount Received by Theodore Le Roy upon the Judgment in Le Roy vs. *Estudillo & al., and the Amount of the Deficiency on the Amount Due Him Personally.*

	Amount found due by decree		$766,577
	Costs of suit		1,500
1879.			
Jan'y 10.	Amount of judgment		$768,077
	Deduct claim of lawyers	$49,000 00	
	And interest on $49,000 from Oct. 1, 1870, to Jan'y 10, 1879, at 1¼ per cent. per month	60,821 25	
			109,821 25
			$658,255 75
	Deduct Le Roy's commission, which was also included in the judgment		11,311 89
	Amount due Le Roy personally (besides his commission)		646,943 86

1880.			
April 17.	Interest at 7 p'r ct. p'r ann. on $646,943.86 from Jan'y 10, 1879, to April 17, 1880----		57,488
			$704,431 86
April 17.	Amount paid Le Roy by B. H. Brooks, commissioner------	$157,242 42	
May 1.	Amount paid Le Roy by Rob't L. McKee, commissioner-----	474,774 93	
May 1.	Amount acknowledged to have been received by Le Roy----	36,797 23	
			668,814 58
	Deficiency due to Theodore Le Roy personally ----------		$35,617 28

551 RESPONDENT'S EXHIBIT 22.

SAN FRANCISCO, *December* 28, 1876.

Theodore Le Roy, Esq.

DEAR SIR: Mrs. C. C. Crittenden, assignee of the firm of Wilson & Crittenden, for legal services in the suit of Juana M. Estudillo *et al. vs.* John B. Ward *et al.*, 3d dist. court of California, has placed said claim in my hands for collection.

Will you be so kind as to inform me of the particulars of the trust assumed by you in regard to said claim, and also as to the steps you have taken to enforce the payment thereof.

Requesting an early answer, I am, with all respect, yours truly,

JAS. L. CRITTENDEN,
Attorney-at-Law, Rooms 59 *&* 60, *Merchants' Exchange.*

552 RESPONDENT'S EXHIBIT 23.

SAN FRANCISCO, *May* 16, 1877.

Theodore Le Roy, Esq.

DEAR SIR; Will you please be so kind as to explain to me the nature of the trust you hold for Mrs. Clara C. Crittenden, widow of A. P. Crittenden, Esq., in the matter of the mortgage given to you by the members of the Estudillo family.

The claim of the late firm of Wilson & Crittenden in said matter has been assigned to Mrs. Clara C. Crittenden.

Very respectfully,

JAMES L. CRITTENDEN,
Attorney-at-Law, Merchants' Exchange.

553 RESPONDENT'S EXHIBIT 24.

SAN FRANCISCO, *June* 14, 1877.

Theodore Le Roy, Esq.

DEAR SIR: Your favor of May 18th, 1877, in regard to the trust held by you in the Estudillo matter, has been duly received and its contents noted.

I herewith enclose a copy of the assignment of the claim of Wil-

son & Crittenden—or the successor of that firm, S. M. Wilson—to Mrs. C. C. Crittenden, and desire to know whether you acknowledge that you are trustee for Mrs. Crittenden. Your letter seems to only admit that you are trustee for the firm of Wilson & Crittenden, or of the successor of said firm.

The original assignment is in my office and is open to your inspection, and can be seen by you at any time.

Please answer at your earliest convenience.

Very respectfully, &c.,

JAMES L. CRITTENDEN,
Attorney for Mrs. C. C. Crittenden,
Merchants' Exchange, Rooms 59 & 60.

554 (Copy.)

RESPONDENT'S EXHIBIT 25.

SAN FRANCISCO, *May* 18, 1877.

James L. Crittenden, Esq.

DEAR SIR: In reply to your letter of the 16th inst. in reference to the deed of trust made to me Oct. 1, 1870, by Juana M. Estudillo and others, I beg to state that out of said deed of trust the late J. B. Felton, Esq., is entitled to the sum of twenty-five thousand dollars; S. M. Wilson, Esq. (or the late firm of Wilson & Crittenden), to the sum of twelve thousand dollars; W. H. Patterson, Esq., to the sum of twelve thousand dollars. These sums are to be paid, principal and interest, from the date of said deed, if money or property shall then remain for this purpose, as soon as I shall be entirely paid whatever amount, including interest, there is or will be due to me.

Very respectfully LE ROY, TH.

555 RESPONDENT'S EXHIBIT 26.

SAN FRANCISCO, *Nov.* 19, 1879.

Mr. Theodore Le Roy, San Francisco.

DEAR SIR: My client, Mrs. C. C. Crittenden, one of the beneficiaries under the deed of trust executed and delivered to you by Juana M. Estudillo and others on the 1st of October, A. D. 1870, desires to know how much money you have received as trustee under said deed. Will you be so kind as to inform me as to total sum of money received by you as such trustee, and what is your estimate of the present value of the property transferred to you by said deed and unsold?

Please state also whether you have received or collected any interest on the $446,849 mentioned in the said trust deed; and, if so, how much, and what amount of interest on said original debt remains unpaid. In making these requests I am acting as Mrs. Crittenden's attorney.

Please reply at your earliest convenience.

With respect, etc., JAMES L. CRITTENDEN,
Attorney for Mrs. Clara C. Crittenden.

P. S.—Mrs. Crittenden is the assignee of Wilson & Crittenden, beneficiaries under said trust deed.

J. L. CRITTENDEN.

556 RESPONDENT'S EXHIBIT 27.

SAN FRANCISCO, *Nov'b'r* 28, 1879.

Mr. Theodore Le Roy, San Francisco.

DEAR SIR: I wrote to you some days since requesting you to make a statement of moneys received by you as trustee under the deed made and executed to you by Juana M. Estudillo and others on the 1st of October, 1870, but you have failed to reply.

I have ascertained from the transcript in the action entitled "Theodore Le Roy *vs.* Juana M. Estudillo *et al.*," now pending on appeal in the supreme court of the State of California, that you had received as trustee under said deed, on the 15th of April, 1878, the sum of four hundred and seventy-seven thousand five hundred and nineteen and nineteen one hundredths ($447,519\frac{19}{100}$) dollars, and that you, as such trustee, had collected and received said sum
557 of money and applied the same to the payment of the interest which had accrued on the sum of $446,849, mentioned in said deed.

Mrs. C. C. Crittenden, as assignee of Wilson & Crittenden, beneficiaries under said trust deed, hereby requests and demands that you immediately pay to her the sum of ten thousand ($10,000) dollars received by you as trustee for her use, and payable to her as such beneficiary, on account of interest on the sum of $12,000, secured by said deed.

Unless this demand is complied with before December 2d, 1879, suit will be brought against you. An immediate answer is requested.

Respectfully, etc.,

JAMES L. CRITTENDEN,
As Attorney for Mrs. C. C. Crittenden.

558 (Copy.)

RESPONDENT'S EXHIBIT 28.

SAN FRANCISCO, *June* 16, 1877.

James L. Crittenden, Esq.

DEAR SIR: Your favor of the 14th inst., with copy of S. M. Wilson's assignment to Mrs. Clara C. Crittenden of the claim of the late firm of Wilson & Crittenden against Estudillo & others, has been received. I therefore consider Mrs. Crittenden as having succeeded to the rights stated in my letter to you of May 18th, 1877, as belonging to "S. M. Wilson, Esq., or the late firm of Wilson & Crittenden."

Very respectfully, LE ROY, TH.

559 (Copy.)

RESPONDENT'S EXHIBIT 29.

James L. Crittenden, Esq.

DEAR SIR: When your note of the 19th inst. arrived Mr. Stein-

bach, who has charge of the accounts referred to therein, was absent from the city, and did not return until the 27th. I am glad to learn from your note of the 28th that his absence did not put you to any inconvenience.

I have not received any money as trustee for the use of Messrs. Wilson & Crittenden or of Mrs. C. C. Crittenden, as their assignee, nor have I received sufficient money from any and all sources to pay the amount due to myself for principal and interest.

I am not in any way indebted to Mrs. Crittenden, nor have I in my hands any money belonging to her, and I, therefore, decline to comply with your request.

Respectfully, &c., LE ROY, TH.

560 United States Circuit Court, Ninth Circuit, District of California.

G. D. NEWHALL
v.
E. J. LE BRETON, Administrator of the Estate of Theodore Le Roy, Deceased, *et al.*

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing five hundred and fifty-nine written and four hundred and nine printed pages, numbered from 1 to 559 and 1 to 409, respectively, inclusive, and numbered, respectively, volume 1 and volume 2, to be a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and seal of said circuit court this 16th day of May, A. D. 1883.

[The Seal of the Circuit Court, District of Cala.]

L. S. B. SAWYER, *Clerk.*

561 In the Supreme Court of the United States. October Term, A. D. 1885.

GEORGE D. NEWHALL
vs.
EDWARD J. LE BRETON, Administrator of Theodore Le Roy *et al.* } No. 260.

It is hereby stipulated by and between the parties that the following exhibits in the record of this case as made up by the clerk of the U. S. circuit court for the ninth circuit and district of California may be omitted by the printer in printing said record, viz:

Complainant's Exhibit X, being printed transcript of case of Theodore Le Roy *vs.* Juana M. Estudillo *et al.*, in 3d judicial district court, Alameda county, California, excepting the pleadings, pages 1 to 6, inclusive, and pages 56 to 66, inclusive, and excepting report of John B. Mhoon, referee, pages 77 to 82, inclusive, and 8 lines on

page 83, and findings of fact and law by John B. Mhoon, referee, pages 306 to 309, inclusive, and four lines on page 310, and
562 judgment of the court, pages 388 to 408, inclusive.

It is further stipulated and agreed that either party may, if he desires, refer to and quote in printed briefs of counsel any part of such omitted matter.

Feb'y 24th, 1886.

L. D. McKISICK,
Att'y for Plaintiff.
HENRY BEARD,
Att'y for Plaintiff.
KRISBURY & BLANDING,
Att'ys for Respondent.

[Endorsed:] No. 260. Supreme Court United States, October term, A. D. 1885. George D. Newhall *vs.* Edward J. Le Breton, administrator of Theodore Le Roy *et al.* Stipulation.

Supreme Court U. S., October term, 1885. No. 260. G. D. Newhall, app't, *vs.* E. J. Le Breton, adm'r, &c. Stipulation of counsel omitting portions of record in printing. Office Supreme Court U. S. Filed Mar. 10, 1886. James H. McKenney, clerk.

563 *Transcript on Appeal.*

In the Supreme Court of the State of California.

In the District Court of the Third Judicial District of the State of California, in and for the County of Alameda.

THEODORE LE ROY, Plaintiff,
vs.
JUANA M. ESTUDILLO, JOSÉ RAMON ESTUDILLO, JOSÉ ANTONIO Estudillo, José Vicente Estudillo, Luis D. Estudillo, Jesus Maria Estudillo, Magdalena E. Nugent, John Nugent, Defendants.

Complaint.

Theodore Le Roy, the plaintiff above named, complains of the above-named defendants, and for cause of action avers:

I. That heretofore, to wit, on the first day of October, A. D. 1870, the said defendants, Juana M. Estudillo, José Ramon Estu-
564 dillo, José Antonio Estudillo, José Vicente Estudillo, Luis D. Estudillo, Jesus Maria Estudillo, Magdalena E. Nugent, and John Nugent, were indebted to the said plaintiff in the sum of four hundred and forty-six thousand eight hundred and forty-nine dollars, in gold coin of the United States, with interest from said date until paid, at the rate of one and one-quarter per cent. per month, in like gold coin. That on said last named day said last-named defendants, for the purpose of securing the payment of said sum, with interest thereon as aforesaid, made, executed, acknowledged, and delivered to the plaintiff their certain deed of trust or mortgage, a copy whereof is hereto annexed and marked "Exhibit A," and

which plaintiff prays may be made and taken as a part of this complaint.

II. Plaintiff further alleges that said instrument, "Exhibit A," was by the said defendants, Magdalena E. Nugent and John Nugent, duly acknowledged before James G. Carson, a notary public in and for the city and county of San Francisco, State of California, in the manner and form by law provided, to enable a married woman to convey or mortgage her separate estate, and was by the said defendants, Juana M., José Ramon, José Antonio, José Vicente, Luis D., and Jesus Maria, duly acknowledged before the said Carson, notary public as aforesaid, and was by the said Carson, notary public as aforesaid, duly certified in manner and form as aforesaid, and so as to entitle the same to be recorded, and that the same was afterwards, to wit, on the 12th day of October, 1870, recorded in book 59 of deeds, page 206 *et seq.*, in the office of the recorder of the county of Alameda; and on the 17th day of October, 1870, in book H of deeds, page 788 *et seq.*, in the office of the county recorder of Santa Barbara county; and on the 7th day of November, 1872, in book D of deeds, page 458 *et seq.*, in the office of the county recorder of San Luis Obispo county; in which said counties the said mortgaged premises then were and now are situated, whereby the said named defendants became liable to pay to the said plaintiff the sum of money, with interest, in the said deed of trust mentioned, according to the terms the terms thereof, and the said premises in the said instrument described were conveyed to the said plaintiff to secure the due payment of the same, together with the costs and charges thereto incident, as in the said instrument expressed; that the de-
565 fendants have failed to pay the said sum of $446,849, or any part thereof, except only as hereinafter set forth, though demand has been duly made upon the said defendants for the payment of the same.

III. That at divers times since the said 1st day of October, 1870, and prior to the commencement of this suit, the plaintiff, acting under and in pursuance of the power and authority in him vested by the said instrument, "Exhibit A," has granted, sold, conveyed, and leased to divers persons certain portions of the real and personal property therein described, and has received and realized therefrom, and from the rents and profits of said lands and property, divers sums of money, as will more fully and at large appear by reference to "Exhibit B," hereto annexed, and which plaintiff prays may be made and taken as a part of this complaint.

IV. Plaintiff further alleges that in part payment of a portion of and for said sales, conveyances, and leases he, the said plaintiff, received and took and now holds from certain of said purchasers thereof as aforesaid certain notes, mortgages, and other securities and evidences of indebtedness, the dates, terms, and amounts of which are at length mentioned and described in "Exhibit C," hereto annexed, and which plaintiff prays may be made and taken as a part of this complaint, as, by reference to said "Exhibit C," will more fully and at large appear.

V. Plaintiff further alleges that at divers times between the said

1st day of October, 1870, and the commencement of this action, the plaintiff, acting under and in pursuance of the power and authority in him vested by the said instrument, "Exhibit A," has paid, laid out, and expended certain advances, costs, and disbursements in gold coin of the United States to certain of said defendants and in and about said premises and property described in "Exhibit A," to the persons, for the purposes, in the sums, and at the times mentioned in "Exhibit D," hereto attached, and which plaintiff prays may be made and taken as a part of this complaint, as, by reference to said "Exhibit D," will more fully and at large appear; which said sums, with interest thereon from the respective dates of said several advances, payments, and disbursements, as in "Exhibit A" provided, are valid and subsisting lien upon said premises and property in said "Exhibit A" described, and upon the securities and evidences of indebtedness in "Exhibit C" described; which said several sums of interest are more fully and at large set forth in "Exhibit E," hereto annexed, and which plaintiff prays may be made and taken as a part of this complaint.

566

VI. Plaintiff further alleges that under and in pursuance of said "Exhibit A" there is now due and owing from said last-above-named defendants to him, the said plaintiff, as commissions on sales hereinabove mentioned, the sum of 2½ per cent. upon the gross amounts of said sales, in gold coin of the United States; which said commissions now amount to the sum of $4,843.93, and which said sum is a valid and subsisting lien upon the property, premises, and securities hereinabove described.

VII. Plaintiff further alleges that he is now the lawful owner and holder of said mortgage, "Exhibit A," and of all the indebtedness secured thereby; that the said mortgage is a valid and subsisting lien upon the lands and premises and property of every description whatsoever therein described, and upon all and singular the notes, mortgages, leases, demands, securities, and evidences of indebtedness in said schedules, "Exhibits A and C," mentioned and described, and that the said defendants are now indebted to the plaintiff upon the said mortgage, "Exhibit A," and for the several advances, disbursements, and commissions made by and accrued to the plaintiff thereunder, as more fully appears by said schedule, "Exhibit D," together with interest thereon, as provided in said "Exhibit A," less the amount of receipts in "Exhibit B" mentioned, in the sum of four hundred and forty-six thousand eight hundred and forty-nine dollars, being the principal amount named in said "Exhibit A," and in the further sum of eighty-two thousand three hundred and thirty $\frac{61}{100}$ dollars, being the amount of the said several advances, expenditures, and disbursements named and set forth in "Exhibit D" aforesaid, together with interest on the said principal sum of four hundred and forty-six thousand eight hundred and forty-nine dollars, at the rate of one and a quarter per cent. per month from the 1st day of October, 1870, and at the same rate upon the said several sums so as aforesaid advanced, expended, and disbursed from the respective dates of advancement, expenditure, and disbursement thereof, together with the sum of four thousand eight hundred and

forty-three $\frac{93}{100}$ dollars, as plaintiff's commissions, now amounting in the aggregate to the sum of six hundred and sixty-five
567 thousand nine hundred and twenty-nine $\frac{51}{100}$ dollars, all in gold coin of the United States.

VIII. Plaintiff further alleges that the sum of three (3) per centum, in gold coin of the United States, upon the whole amount of principal, advances, and interest found to be due in this action is a reasonable and proper counsel fee in and about the commencement and prosecution of this action and for the foreclosure of said mortgage, and is justly due and chargeable against the defendants, and is a valid and subsisting lien upon the said premises and property herein described, and upon the whole thereof.

Plaintiff further avers that under and in pursuance of the powers vested in him by said "Exhibit A," said plaintiff will, pending this action and before the heading thereof, necessarily be compelled to advance and disburse other and divers sums of money in and about the protection and care of said premises and property in said "Exhibit A" mentioned and described; that plaintiff is ready and willing and desires to render a full, true, and just account of all advances, expenditures, disbursements made and to be made as aforesaid, and all moneys received as aforesaid, and which may, before the heading hereof, be received by him, the said plaintiff, and of all and every part of his dealings in the premises, to the end that the full, true, and just amount due and owing by the defendants to the plaintiff, and secured as aforesaid, may be determined by this honorable court.

IX. Wherefore the plaintiff prays that the said defendants, Juana M. Estudillo, José Ramon Estudillo, José Antonio Estudillo, José Vicente Estudillo, Luis D. Estudillo, Jesus Maria Estudillo, Magdalena E. Nugent, and John Nugent, and all persons claiming by, through, or under them, or any or either of them, may be barred and foreclosed of all right, title, claim, lien, or equity of redemption and interest in and to the said premises and property in said "Exhibit A" described, and in and to the said notes, mortgages, leases, demands, securities, and other indebtedness as hereinbefore described; that upon the hearing of this cause an account may be taken by and under the direction of this honorable court of all *the* singular, the dealings and transactions aforesaid between said plaintiff and defendants, and of all the dealings and transactions thence-
568 forward and up to the time of the taking of said account, to the end that the full, true, and just amount due and owing by the defendants to plaintiff, and secured as aforesaid, may be determined by this honorable court, and that the defendants may be decreed to pay unto the plaintiff what shall appear to be justly due and owing to him on the taking of the aforesaid account.

That the said premises, property, and other securities may be decreed to be sold according to law; that out of the proceeds arising from such a sale there be paid to said plaintiff the sum of $665,921.59, with interest from the 26th day of September, 1874, at the rate of one and one-quarter per cent. per month upon the sum of $529,029.75 thereof, being the principal sum named in "Exhibit A,"

and the amount of advances, expenditures, and disbursements made by plaintiff subsequent to the filing of this complaint, with interest thereon at the same rate from the respective dates of such advances, expenditures, and disbursements, together with any other and further commissions that may accrue to the plaintiff subsequent to the filing of this complaint, and as may appear upon the taking of the account as aforesaid; and also the sum of three per cent. upon the whole amount of said principal, advances, and interest due as aforesaid at the time of such sale as plaintiff's counsel fees, and also all costs of suit, all in gold coin of the United States, so far as the amount of moneys properly applicable thereto will pay the said principal, interest, advances, commissions, counsel fees, and costs of suit, and that the said defendants, Juana M. Estudillo, José Ramon, José Antonio, José Vicente, Luis D., Jesus Maria, Magdalena E. Nugent, and John Nugent may be adjudged to pay any deficiency which may remain after applying all of said money so applicable thereto, and that the said plaintiff may have judgment and execution against them therefor, and that the said plaintiff may have such other and further relief or both in the premises as may be just and equitable.

NEWHALL & CARSON,
Attorneys for Plaintiff.
JOHN B. FELTON,
Of Counsel.

Complaint duly verified Sept. 26th, 1874, by plaintiff.

569 "EXHIBIT A."

This indenture, made the first day of October, A. D. one thousand eight hundred and seventy, between Juana M. Estudillo, José Ramon Estudillo, José Antonio Estudillo, José Vicente Estudillo, Luis D. Estudillo, Jesus Maria Estudillo, Magdalena E. Nugent, and John Nugent, parties of the first part, and Theodore Le Roy, party of the second part, witnesseth:

Whereas the said parties of the first part are indebted to the said party of the second part in the sum of four hundred and forty-six thousand eight hundred and forty-nine dollors, gold coin of the United States, on which said sum the said parties of the first part have agreed to pay to the said party of the second part interest at the rate of one and one-quarter per cent. per month, payable in like gold coin, which said sum has been advanced by the said party of the second part to the said parties of the first part on the agreements, understandings, and conditions hereinafter set forth, and in which said sum is included the sum of two hundred and eighteen thousand three hundred and seventy-two twelve one-hundreths dollars, in gold coin, due by one John B. Ward to the Hibernia bank, the payment of which the said party of the second part has assumed, at the request of the said parties of the first part, and with the understanding and agreement that said assumption shall be regarded as an advance at the date thereof of so much money by the said party of the second part to the said parties of the first part;

And whereas the said parties of the second part have, by this instrument, conveyed and sold to the said party of the second part, his heirs, executors, and assigns, the real estate and personal property hereinafter described, and have agreed with the said party of the second part that he shall be clothed with the full powers of ownership of said real estate and personal property until by the sale thereof said indebtedness is fully paid, or until the said indebtedness is otherwise fully paid by the said parties of the first part to the said party of the second;

And whereas the said parties of the first part have agreed that the said party of the second part shall have the irrevocable power, without recourse to law, to pay and reimburse himself the whole of his said indebtedness, principal and interest, out of the sales made by him of said real estate and personal property, and shall
570 have the full management, control, and disposition of the said real and personal estate as if the same belonged to him in full ownership:

Now, therefore, this indenture witnesseth that the said parties of the first part, for and in consideration of the advances made to them as above set forth, simultaneously with the execution of this instrument, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns, forever—

All those certain tracts of land or properties known as the "rancho San Leandro," in Alameda county, State of California, being the same rancho heretofore granted by the Mexican government to José Joaquit Estudillo.

Also that certain rancho or tract of land situated in the county of Santa Barbara, State of California, known as the "Guadalupe rancho," being the same land which was granted to Diego Olivera and Teodoro Arellanes by the Mexican government.

Also that certain rancho or tract of land situated in the county of Santa Barbara, State of California, and known as the "Casmalia rancho," being the same land which was granted to Antonio Olivera by the Mexican government.

Also those certain pieces or parcels of swamp and overflowed lands situate in the county of Alameda, State of California, viz: That certain piece described in the field-notes of survey No. 208 swamp and overflowed lands, Alameda county, containing 129 $\frac{60}{100}$ acres, being the same lands conveyed by deed, bearing date May 6th, 1867, made and executed by M. A. Bacon to John B. Ward, and by said Ward this day conveyed to said parties of the first part.

Also that certain other piece described in survey No. 223 swamp and overflowed lands, containing 207 $\frac{9}{100}$ acres, being the same lands conveyed by deed, bearing date September 6th, 1867, made and executed by D. B. Mann to John B Ward, and by said Ward this day conveyed to said parties of the first part, excepting, however, out of the above-described "San Leandro rancho," and from the operation of this deed, the piece or parcel of land described as follows: Beginning at the southeast corner of Oscar Lewis' tract,

and on the north side of Ward avenue; thence easterly to the
571 end of Ward avenue; thence along the east side of the county road, heretofore surveyed to the Redwoods; thence to the center of San Leandro creek; thence northerly along the said creek; thence westerly along the center of said creek to the northwest corner of Oscar Lewis' tract; thence along said Lewis' tract to the place of beginning.

Also all the personal property of every kind and nature in the said real estate above described, and all the personal property of whatever kind and nature in the hands of L. L. Robinson, receiver in the suit of Juana M. Estudillo *et al. vs.* John B. Ward *et al.*, in the district court of the third judicial district, excepting therefrom certain personal property belonging to Charles H. Cushing and wife, enumerated in the answer of said Cushing and wife in said action.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first [part] of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above-mentioned and described premises, less the portion thereof expressly hereinabove excepted, unto the said party of the second part, his heirs and assigns, forever, upon and for the purpose of executing the following trusts, to wit:

First. To keep insured to a reasonable amount against loss by fire all buildings and improvements on said premises if the said party of the second part shall deem best.

Second. To pay all taxes imposed thereon and all assessments and liens.

Third. To sell the same, or any parts or parcels thereof, for cash, or for part cash and on credit, at public or private sale, with or without notice to the said parties of the first part, it being understood that said Le Roy may sell, discount, and dispose of all or any notes, mortgages, or securities taken for deferred payments at his discretion, also to lease the same in parcels or as a whole.

Fourth. To pay off the said indebtedness hereinabove specified, with the interest thereon, and all sums which may hereafter be advanced by the said party of the second part to the said parties
572 of the first part, or any or either of them, or at the request of any or either of them; also all taxes, liens, or other incumbrances, costs of lawsuits and counsel fees, and other expenses of litigation spent in and about the protection of the title of the said property, it being understood that all advances made by the said party of the second part to the said parties of the first part, or any or either of them, shall bear interest from the date of the advance at the rate of one and one-quarter per cent. per month.

Fifth. To retain as commissions two and one-half per cent. on

the gross amounts of all sales made by the said party of the second part.

Sixth. After all of the above payments, expenditures, and advances, with interest as above provided, shall be paid, then said Le Roy shall reconvey to the grantors above named, in proportion to their repective interests, as claimed to be held by them immediately prior to the execution hereof, and shall account to them and pay over to them all surplus moneys received from sales, and transfer to them all securities for deferred payments.

Seventh. This trust may be terminated as to all unsold portions of said property, and said parties of the first part shall be entitled to a reconveyance on payments of all the sums of money hereinbefore provided to be paid; and said parties of the first part may make payment of the whole or any part of said indebtedness at any time.

Eighth. The said party of the said second part shall receive commissions on sales at the rate of two and one-half per centum on the dollar, such commissions, however, not to be deducted or charged until all payments above mentioned are made.

Ninth. The trust hereby created is a continuing and subsisting trust until the whole of the indebtednesss herein above specified is paid, and it shall not be necessary for tha said party of the second part to bring any suit on said indebtedness to stop the statute of limitations from running. It is also understood and agreed between the parties hereto that a release this day made to John B. Ward, Sophia Juana Ward, and John Francis Ward and Charles H. Cushing and Dolores, his wife, of three hundred acres of land in the San Leandro ranch was made with the full consent and at the request of the parties of the first part.

It is also understood that the said Juana M. Estudillo may
573 have the right to cause the building and block now occupied by her as a residence to be reconveyed to her by the said Le Roy on the payment by her to him of the sum of eight thousand one hundred dollars in gold coin, with interest at the rate of one and one-quarter per cent. per month in gold coin. This provision, however, is not to change in any respect the powers of the said Le Roy hereinabove given.

It is further understood that the said Le Roy shall have the right out of the proceeds of said property as aforesaid to pay any sum that may be awarded to L. L. Robinson by the court of the third judicial district for services as receiver in the action of Juana M. Estudillo *et al. vs.* John B. Ward *et als.*, after paying the indebtness hereinabove specified.

It is further understood that a certain deed, made and executed by John B. Ward, Juana Sophia Ward, John Francis Ward, Charles H. Cushing, and Dolores Cushing and Juana M. Estudillo, was made with the full consent of the said parties of the first, and that the interest so conveyed is vested in the said Le Roy by this indenture.

It is further understood that the said Le Roy, in executing the

trusts aforesaid, shall only be responsible for acts of bad faith by him committed.

It is further understood that the said Le Roy will not sell the two blocks of land and the house constituting the residence of the said Juana M. Estudillo until he shall have sold all the other property conveyed to him in this instrument.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JUANA M. ESTUDILLO. [SEAL.]
JOSÉ R. ESTUDILLO. [SEAL.]
JOSÉ A. ESTUDILLO. [SEAL.]
JOSÉ VICENTE ESTUDILLO. [SEAL.]
LOUIS D. ESTUDILLO. [SEAL.]
JESUS MARIA ESTUDILLO. [SEAL.]
MAGDALENA ESTUDILLO NUGENT. [SEAL.]
J. M. NUGENT. [SEAL.]

Signed, sealed, and delivered in presence of—
JAMES G. CARSON.

Endorsed: Complaint on foreclosure. Filed Sept. 26, 1874.

574 *Answer.*

(Title of court and cause.)

Defendants, answering plaintiff's complaint, admit that on the 1st day of October, 1870, they were indebted to plaintiff in a large sum of money, which it is believed on said day to have amounted to the sum first stated in the complaint, to wit, $446,849; but of the precise amount thereof these defendants are ignorant, and therefore deny, upon and according to their information and belief, that the same did amount to said last-named sum on said day.

Admit the execution and delivery of a mortgage or deed of trust mentioned in the complaint, but whether or not a true copy thereof is annexed to the complaint these defendants are ignorant, and therefore deny that the same is a true copy.

Deny that the Court-house Square, or block so called, situate in the village of San Leandro, is or ever was embraced in said mortgage.

Admit that at divers times since the date of said mortgage the plaintiff did advance to and pay out for these defendants various sums of money, but the date of such advances and the amounts thereof respectively these defendants are ignorant, and therefore deny, upon and according to their information and belief, that plaintiff, in the aggregate, advanced and paid out the sums, or any considerable proportion of the sums, mentioned in the schedule annexed to the complaint and headed "Exhibit D."

Aver, upon and according to their information and belief, that plaintiff, since the date of said mortgage and deed of trust, has received large sums of money for principal and interest on the sales of subdivisions of the lands described in the said mortgage and deed

of trust, to wit, the sum of $——, and also has received from the sales of personal property in the hands of him, the said plaintiff, belonging to these defendants, other large sums of money, to wit, $——.

Aver, upon and according to their information and belief, that plaintiff, with intent to prevent defendants from receiving the full value thereof, sold and conveyed parcels of said land at prices far below the value thereof, whereby these defendants were damaged and sustained loss to a large amount, to wit, the sum of $100,000 or thereabouts.

575 That, as defendants are informed and believe, and therefore aver, the plaintiff, with intent to have an accumulation of interest upon said note and mortgage, willfully refused to make sales of portions of said land, more especially of portions of the Guadalupe rancho, when he had opportunities so to do at fair prices, whereby defendants suffered loss and damage to the amount of $50,000, or thereabouts.

Aver that the provision of said mortgage providing for the allowance to plaintiff of two and one-half per cent. commission is unreasonable, unconscionable, and against equity.

Aver that said plaintiff, by the injudicious and improper manner of making sales of portions of said lands, without regard to the effect on the value of the surrounding and adjacent portions thereto, has rendered such adjacent portions comparatively worthless and unsalable, to defendant's damage in the sum of $150,000, or thereabouts.

Wherefore these defendants pray that an accounting be had of the dealings between plaintiff and defendants arising out of said mortgage and deed of trust, and that in such accounting the plaintiff be charged with all and singular the moneys received by him from sales of property and leases thereof mentioned in the answer, and for the damages sustained by defendants in consequence of the bad management, wrongs, and injuries herein averred.

JOHN NUGENT,
Attorney for Defendants.
WM. H. PATTERSON,
Of Counsel.

Duly verified August 31, 1876, by John Nugent.

(Endorsed:) Due service hereof admitted this 31st day of August, A. D. 1876. John B. Felton, plaintiff's attorney. (Filed Sept. 1st, 1876.)

Amended Answer.

576 (Title of court and cause.)

Now come the defendants for amended answer to plaintiff's complaint:

First. Admit that on the 1st day of October, 1870, they were indebted to plaintiff in a large sum of money which it is believed on said day to have amounted to the sum first stated in the complaint,

to wit, $446,849; but the precise amount thereof these defendants are ignorant, and therefore deny, upon and according to their information and belief, that the same did amount to said last-named sum on said day.

Admit the execution and delivery of a mortgage or deed of trust, mentioned in the complaint, but whether or not a true copy thereof is annexed to the complaint these defendants are ignorant, and therefore deny that the same is a true copy.

Deny that the Court-house Square, or block so called, situate in the village of San Leandro, is, or ever was, embraced in said mortgage.

Admit that at divers times since the date of said mortgage the plaintiff did advance to and pay out for these defendants various sums of money, but the date of such advances, and the amounts thereof respectively, these defendants are ignorant, and therefore deny, upon and according to their information and belief, that plaintiff, in the aggregate, advanced and paid out the sums, or any considerable portion of the sums, mentioned in the schedule annexed to the complaint, and headed "Exhibit D."

Aver, upon and according to their information and belief, that plaintiff, with intent to prevent defendants from receiving the full value thereof, sold and conveyed parcels of said land at prices far below the value thereof, whereby these defendants were damaged and sustained loss to a large amount, to wit, the sum of $100,000 or thereabouts.

That, as defendants are informed and believe, and therefore aver, the plaintiff, with intent to have an accumulation of interest upon said note and mortgage, willfully refused to make sales of portions of said land, more especially of portions of the Guadaloupe rancho, when he had opportunities so to do at fair prices, whereby defendants suffered loss and damage to the amount of $50,000 or thereabouts.

577 Aver that the provisions of said mortgage providing for the allowance to plaintiff of two and one-half per cent. commissions is unreasonable, unconscionable, and against equity.

Aver that said plaintiff, by the injudicious and improper manner of making sales of portions of said lands, without regard to the effect on the value of the surrounding and adjacent portions thereto, has rendered such adjacent portions comparatively worthless and unsalable, to defendants' damage in the sum of $150,000 or thereabouts.

Second. The defendants, for further and separate answer, and by way of counter-claim, and for the purpose of obtaining affirmative relief against the plaintiff, allege:

That since the execution of the deed of trust mentioned in the complaint the plaintiff has received from rents, profits, and sales of the portions of the premises in said mortgage and deed of trust described a large sum of money, and, as defendants verily believe, and upon such information and belief aver, an amount largely exceeding that claimed to be due to said plaintiff by said defendants under the terms of said mortgage and deed of trust, and that upon a fair

accounting said plaintiff will be found indebted to these defendants.

That the plaintiff, notwithstanding he has received the entire amount due him under said mortgage and deed of trust, is now threatening, and will, unless restrained by an order of this honorable court, sell said premises and property so described in said complaint, to the great damage of defendant.

Wherefore these defendants pray that an account be had of all the dealings between plaintiff and defendants arising out of said mortgage and deed of trust.

That in such accounting the plaintiff be charged with all and singular the moneys received by him for the sales of property and leases thereof mentioned in this answer and the damages sustained by defendants in consequence of the bad management, wrongs, and injuries therein averred.

That upon such accounting being had it be decreed by this court that said plaintiff has been fully paid all moneys alleged to be due him under said mortgage and deed of trust, and the defendants be declared the owners of all the real and personal property in said complaint described.

578 That the plaintiff be decreed to execute and deliver to the defendants a good and sufficient deed and conveyance of all the real estate and personal property in said complaint described, and that, until said accounting be had, *that* the plaintiff be enjoined and restrained from making any sale, transfer, or other disposition of said property in said complaint described, or any part thereof.

And for such other and further relief as may be just and equitable.

WM. H. PATTERSON,
Att'y for Def'ts.

Duly verified by John Nugent, Dec. 18, 1876.

Endorsed: Filed Jan. 2, 1877.

(Title of court and cause.)

Substitution of Attorney for Defendants.

To William H. Patterson, Esq.

SIR: The undersigned, Juana M. Estudillo, José Ramon Estudillo, José Antonio Estudillo, José Vicente Estudillo, Luis D. Estudillo, and Jesus Maria Estudillo, defendants above named, and for whom you have appeared and answered, conceiving that our interests are now opposed to the said Magdalena E. Nugent and John Nugent, and that you cannot properly and consistently represent these conflicting interests, and especially conceiving and believing that the sale negotiated by plaintiff of the lands embraced in said mortgage, is one which our interests requires to be consummated, do therefore respectfully request that you will consent to substitute for yourself A. M. Crane, Esq., as our attorney in the above-entitled action.

This request is made with the utmost respect to yourself, and is asked only on the ground above stated, *i. e.*, that our interests, as we

conceive them, are in conflict with said Nugent and wife, whose interests you may still continue to represent.

Dated San Francisco, January 17th, 1877.

JUANA M. ESTUDILLO.
JOSÉ RAMON ESTUDILLO,
Per JUANA M. ESTUDILLO.
JOSÉ VICENTE ESTUDILLO,
Per JUANA M. ESTUDILLO.
LUIS D. ESTUDILLO,
Per JUANA M. ESTUDILLO.
J. M. ESTUDILLO.
JOSÉ A. ESTUDILLO.

579 I hereby substitute, pursuant to the above request, A. M. Crane, Esq., as attorney for the signers above in the above-entitled action, and request said substitution to be entered on record.

January 17th, 1877.

WM. H. PATTERSON,
Attorney for said Plaintiffs.

Endorsed: Filed January 27, 1877.

(Title of court and cause.)

Replication of Plaintiff to Cross-Complaint of Defendants.

Now comes the plaintiff, and, for replication to the answer or counter-claim of defendants—

Admits that since the execution of the deed of trust mentioned in the complaint the plaintiff has received from rents and sales of portions of the premises in said mortgage and deed of trust described a large sum of money, but denies that the amount thereof exceeds the sum due by the defendants to the plaintiffs under the terms of the mortgage and deed of trust, and denies that upon a fair accounting this plaintiff will be found indebted to said defendants; and avers, on the contrary, that the sum due by the defendants to the plaintiff under the terms of said mortgage and deed of trust far exceeds the amount of money received by the plaintiff since the execution of said mortgage and deed of trust, and that upon a fair accounting the said defendants will be found indebted to this plaintiff in a large amount of money; and avers that the amount of indebtedness of said defendants to this plaintiff on the tenth day of April, 1877, is six hundred and seventy thousand seven hundred and twenty-eight dollars and fifteen cents ($670,728.15), in gold coin of the United States, exclusive of plaintiff's commission on sales of amounts due by plaintiff for legal and other services, and of other amounts of money which this plaintiff will be called upon to expend under the terms of said mortgage and deed of trust; that this will more fully appear upon the examination of the statements of account made to September 26th, 1874, and attached to the complaint herein of the statement of account made to January 15th,

1877, and filed in this cause, and of the statements of account made to April 19th, 1877, and annexed hereto.

JOHN B. FELTON,
Plaintiff's Attorney.

580 *Report of Referee.*

(Title of court and cause.)

I, the undersigned, to whom it was referred, among other things, to take and state the account between the plaintiff and defendants, report that I have been attended upon said reference by the plaintiff and his counsel, B. S. Brooks, Esq., and by George F. Sharp, Esq., of counsel for John Nugent and wife, and A. M. Crane, Esq., of counsel for the other defendants; that the plaintiff has produced before me his accounts, with proper vouchers for the charges contained therein, and the books of account kept by him, which appear to have been correctly and truly kept by him, and he has also produced before me such maps, schedules, and other documents as I have from time to time required; and I have also received evidence, both real and documentary, introduced by the several parties, and heard the arguments of each of the counsel above mentioned, and I have taken and stated the said account and the same appears in full in the schedules which are hereto annexed and made part hereof.

I find that at no time have the receipts been equal to the interest due at the time of such receipts, and as the interest does not compound there is no necessity of making any rests in the account, and none have been made.

In the trust deed, a copy of which is annexed to the complaint, Exhibit A, the amount of the indebtedness acknowledged to be due from the defendants to the plaintiff is four hundred and forty-six thousand eight hundred and forty-nine dollars, but an error of one hundred and forty-nine dollars and eighty-six cents occurred in the computation of the amount due to the Hibernia Bank, payment of which was assumed by the plaintiff, and is included in the aforesaid amount; and the plaintiff has in his accounts credited the defendants with the amount of said error, so that the true amount due from the defendants to plaintiff at the date of the said trust deed was four hundred and forty-six thousand six hundred and ninety-nine dollars and fourteen cents.

In this amount is included the sum of forty-nine thousand dollars due from the defendants to certain other creditors for legal services, which sum was not paid by the plaintiff, but was intended to be secured in this way for the benefit of the said creditors.

581 In the schedule annexed marked Plaintiff's Exhibit C is contained a statement of the advances and disbursements made by Theodore Le Roy after October 1st, 1870 (the date of said trust deed), for account of the defendants under and by virtue of the said deed of trust up to the 10th of April, 1877 and in the schedule annexed marked Plaintiff's Exhibit D is contained a continuation of said account to August 25, 1877, and in the schedule an-

nexed marked Plaintiff's Exhibit D 2 is contained a continuation of said account to October 19, 1877, and in the schedule annexed marked Plaintiff's Exhibit D 3 is contained a continuation of the said account to the date hereof.

Plaintiff's Exhibit C, up to page 12, inclusive, being a counterpart of a similar account annexed to the complaint, and shows that account up to that time, and the pages of said Exhibit C from 13 to 24, inclusive, being a continuation of said account to January 15, 1877, and being a counterpart of an account filed with the clerk of the court February 23d, 1877, prior to the order of reference, and the remaining two pages, 25 and 26, being the continuation of said account up to the 10th of April, 1877, being the counterpart of an account filed on the 12th of April, 1877, with the clerk of this court; also before the reference and Exhibits D, D 2, and D 3, being continuations of the same account rendered during the reference.

That the schedule hereto annexed, marked Plaintiff's Exhibit E, contains a true statement of of the calculation of interest on the advances and disbursements made by the plaintiff after October 1st, 1870, to September 24, 1874, calculated on such items separately from the date of the disbursements. Continuations of the said calculations of interest were filed with the clerk of this court on the 23d of February, 1877, to January 15, 1877, and 12th of April, 1877, to April 10, 1877, and are now on file and are correct calculations of interest to those dates respectively; the schedules annexed, marked Plaintiff's Exhibits G, G 2, and G 3, are true continuations of the calculations of interest up to August 25, 1877, Oct. 19, 1877, and April 15, 1878, respectively.

That the commissions due to the plaintiff on the aggregate amount of sales of real and personal property made by the plaintiff from October 1st, 1870, to the date hereof, four hundred and fifty-
582 two thousand four hundred and seventy-five dollars and ninety-five cents, at two and one-half per cent., the rate fixed by the trust deed, is eleven thousand three hundred and eleven dollars and eighty-nine cents.

The schedule hereto annexed, marked Plaintiff's Exhibit B, contains a true statement of the several sums of money received by plaintiff under the deed of trust for the account of the defendants up to the 26th of September, 1874, and is the counterpart of Exhibit B, annexed to plaintiff's complaint.

The schedule hereto annexed, marked "Plaintiff's Exhibits F F 1, F 2, and F 3," contain continuations of said account up to the date hereof.

The plaintiff in his account credited himself with certain commissions paid by him to persons employed by him to effect sales and with interest upon these payments. I have disallowed these payments. The schedule hereto annexed, marked "Plaintiff's Exhibit S," contains a true statement of the said charges and the interest thereon, and I have charged these amounts against him in the final account.

The plaintiff availed himself of his right to take to his own account and use certain of the notes and mortgages and other claims, and has charged himself in the account with the amounts thereof,

with the interest added up to the date hereof. The schedule hereto annexed, marked "Plaintiff's Exhibit T," is a true statement of the several debts and claims so taken to the account of plaintiff and the interest on each.

The schedules hereto annexed and made part hereof, marked "Plaintiff's Exhibit L and L 2," "Plaintiff's Exhibit M," and "Plaintiff's Exhibit N," contain a true statement of the sales made by the plaintiff under said deed of trust, showing the date of sale, the property sold, the price, and the mode and time of payment, and the security given for deferred payments, and the payments which have been made up to the date when said accounts were presented. No further sales have been made, but some payments have been made, all of which appear in the account of receipts, "Plaintiff's Exhibit F 3."

The final account, hereto annexed and made a part hereof, contains a general statement of the account to date, showing a balance due from the defendants to the plaintiff of seven hundred
583 and two thousand six hundred and twenty-three dollars and sixty-six cents, payable, with interest, at one and a quarter per cent. per month in gold coin of the United States.

All of which is respectfully submitted.

Dated April 15th, 1878. JOHN B. MHOON, *Referee.*

Final Account of Theodore Le Roy with Juana M. Estudillo and Others from Oct. 1, 1870, *to April* 15, 1878.

Debits.

1870, Oct.	1.	To indebtedness of Juana M. Estudillo *et al* to Theodore Le Roy				$446,699 14
1874, Sept.	26.	To advances and disbursements of Th. Le Roy to date			$82,390 61	
1877, Jan.	15.	To	do.	do.	39,919 44	
" Apr.	10.	To	do.	do.	2,391 26	
" Aug.	25.	To	do.	do.	5,192 20	
" Oct.	19.	To	do.	do.	993 10	
1878, Apr.	15.	To	do.	do.	5,037 08	
					$135,863 69	
		Less amount of commission charged, disallowed by referee			3,357 91	
						132,505 78
1878, Apr.	15.	To interest on $446,699.14 to date			$505,142 12	
1874, Sept.	24.	To interest on $82,330.61 to date			26,282 95	
1878, Apr.	15.	To	do.	do.	43,875 56	
1877, Jan.	15.	To interest on $39,919.44 to date			6,871 20	
1878, Apr.	15.	To	do.	do.	7,484 81	
1877, Apr.	10.	To interest on $2,391.26 to date			37 20	
1878, Apr.	15.	To	do.	do.	363 63	
1877, Aug.	25.	To interest on $5,192.20 to date			200 78	
1878, Apr.	15.	To	do.	do.	497 57	
1877, Oct.	19.	To interest on $993.10 to date			10 19	
1878, Apr.	15.	To	do.	do.	72 82	
" "	"	To interest on $5,037.08 to date			241 28	
					$591,080 11	
" "	"	Less interest on $3,357.91 com'on disallowed to date			1,454 07	
						589,626 04
" "	"	To commission of 2½ on $452,475.95 sales				11,311 89
						$1,180,142 85

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Credits.

1874, Sept. 26.	By amount of money received by Th. Le Roy to date				$161,323 81	
1875, Jan. 15.	By	do.	do.	do.	231,160 89	
1877, Apr. 10.	By	do.	do.	do.	11,293 79	
" Aug. 25.	By	do.	do.	do.	10,852 90	
" Oct. 19.	By	do.	do.	do.	10,797 65	
1877, Apr. 15.	By	do.	do.	do.	19,389 60	
" " "	By amount of debts taken by Th. Le Roy for his account				32,700 55	
						$477,519 19
1878, Apr. 15.	To balance due by Juana M. Estudillo *et al.* to Theod. Le Roy, April 15, 1878					$702,623 66

Juana M. Estudillo et als. in Account with Theodore Le Roy.

Debits.

1870, Oct. 1.	To indebtedness acknowledged in deed of trust, dated Oct. 1, 1870	$446,849 00	
	Less difference in the am't paid to the Hibernia Saving and Loan Society on settlement	149 86	
			$446,699 14
1878, Apr. 15.	To interest on said $446,699.14 from Oct. 1, 1870, to April 15, 1878, at 1¼ per cent. per month		505,142 12
1874, Sept. 26.	To advances and disbursements to Sept. 26, 1874, as shown by Exhibit "C," pages 1 to 12 inclusive		82,330 61
1874, Sept. 26.	To interest on said $82,330.61 to Sept. 26, 1874, as shown by Exhibit "E," annexed to the complaint		26,282 95
1878, Apr. 15.	To interest on said $82,330.61 from Sept. 26, 1874, to April 15, 1878, at 1¼ per cent. per month		43,875 56
1877, Jan. 15.	To advances and disbursements from Sept. 26, 1874, to Jan. 15, 1877, as shown by Exhibit "C," pages 13 to 24 inclusive		39,919 44
1877, Jan. 15.	To interest on said $39,919.44 to Jan. 15, 1877, as shown by statement, dated Jan. 15, 1877, filed Feb. 23d, 1877		6,871 20
1878, Apr. 15.	To interest on said $39,919.44 *to* Jan. 15, 1877, to April 15, 1878, at 1¼ per cent. per month		7.484 81
1877, Apr. 10.	To advances and disbursements from Jan. 15, 1877, to April 10, 1877, as shown by Exhibit "C," pages 25 and 26		2,391 26
1877, Apr. 10.	To interest on said $2,391.26 to April 10, 1877, as shown by statement, dated April 10, 1877, filed April 12, 1877		37 20
1878, Apr. 15.	To interest on said $2,391.26 from April 10, 1877, to April 15, 1878, at 1¼ per cent. per month		363 62

585

1877, Aug. 25.	To advances and disbursements from April 10, 1877, to Aug. 25, 1877, as shown by Exhibit "D"	5,192 20
1877, Aug. 25.	To interest on said $5,192.20 to Aug. 25, 1877, as shown by Exhibit "G"	200 78
1878, Apr. 15.	To interest on said $5,192.20 from Aug. 25, 1877, to April 15, 1878, at 1¼ per cent. per month	497 57
1877, Oct. 19.	To advances and disbursements from Aug. 25, 1877, to Oct. 19, 1877, as shown by Exhibit "D 2"	993 10
" " "	To interest on said $993.10 to Oct. 19, 1877, as shown by Exhibit "G 2"	10 19
1878, Apr. 15.	To interest on said $993.10 from Oct. 19, 1877, to April 15, 1878, at 1¼ per cent. per month	72 82
" " "	To advances and disbursements from Oct. 19, 1877, to April 15, 1878, as shown by Exhibit "D 3"	5,037 08
" " "	To interest on said $5,037.08 to April 15, 1878, as shown by Exhibit "G 3"	241 28

1878, Apr. 15.	To commission at 2½ per cent. on $452,475.95, being the aggregate amount of sales of real and personal property made by Th. Le Roy, from Oct. 1, 1870, to April 15, 1878, as shown by Exhibits "L" and "L 2"	11,311 89	
			$1,184,954 83
1878, Apr. 15.	To balance of indebtedness this 15th day of April, 1878		$702,623 66

Credits.

1874, Sept. 26.	By amount of money received from Oct. 1, 1870, to Sept. 26, 1874, as shown by Exhibit "B," annexed to the complaint		$161,323 81
1877, Jan. 15.	By amount of money received from Sept. 26, 1874, to Jan. 15, 1877, as shown by Exhibit "F," pages 1 to 20, inclusive	231,160 89	
" Apr. 10.	By amount of money received from Jan. 15, 1877, to April 10, 1877, as shown by Exhibit "F," page 21	11,293 79	
" Aug. 25.	By amount of money received from April 10, 1877, to Aug. 25, 1877, as shown by Exhibit "F," page 22	10,852 90	
" Oct. 19.	By amount of money received from Aug. 25, 1877, to Oct. 19, 1877, as shown by Exhibit "F 2"	10,797 65	
" Apr. 15.	By amount of money received from Oct. 19, 1877, to April 15, 1878, as shown by Exhibit "F 3"	19,389 60	
" " "	By amount of commission on sales disallowed by the referee, as shown by statement marked Exhibit "S"	3,357 91	
" " "	By interest on said $3,357.91 from date of charge in the account to April 15, 1878, as shown by said statement Exhibit "S"	1,454 07	
586			
1877, Apr. 15.	By amount of outstanding debts with which Theodore Le Roy charges himself, and which he elects to take to his own account, as shown in statement of this date, including interest thereon to this date, marked Exhibit "T"	32,700 55	
" " "	By balance due April 15, 1878	702,623 66	
			$1,184,954 83

587 *Findings.*

(Title of court and cause.)

This cause came on to be tried before J. B. Mhoon, Esq., referee, to whom it was referred to take and state the account between the parties, and to hear and decide the whole issue and to report a finding and judgment on the 14th day of July, A. D. 1877, B. S. Brooks, Esq., appearing for the plaintiff, George F. Sharp, Esq., appearing for John Nugent and wife, and A. M. Crane, Esq., appearing for the other defendants, and the trial was continued from time to time to the 15th day of April, A. D. 1878. Plaintiff presented his accounts in detail and his vouchers supported by his own and other testimony; and testimony, both oral and documentary, having been received, and arguments of counsel having been heard for the several parties, the cause was on the last-mentioned day submitted, and the said referee now files these his findings of fact:

First. That on the 1st day of October, 1870, the defendants executed and delivered their certain deed of trust or mortgage, a copy

whereof is annexed to the complaint herein and marked "Exhibit A," acknowledging an indebtedness of ($446,849) four hundred and forty-six thousand eight hundred and forty-nine dollars, but there was an error of one hundred and forty-nine dollars and eighty-six cents ($149.86), which is credited to defendants in plaintiff's accounts, leaving the true amount of indebtedness on that day four hundred and forty-six thousand six hundred and ninety-nine dollars and fourteen cents ($446,699.14.)

Second. That the dates of advances made by the plaintiff to and paid out for the defendants, and the amounts thereof respectively, are correctly set out in the schedule annexed to the complaint and headed Exhibit D.

Third. That plaintiff, since the date of said mortgage and deed of trust, has received large sums of money on the sales of subdivisions of the lands described in the said mortgage and deed of trust, but said receipts have at no time equalled the interest due to the plaintiff, and no part of said receipts have been applicable or applied to the payment of any part of the principal, but only to the interest.

588 Fourth. The plaintiff has not, with intent to prevent defendants from receiving the full value or otherwise thereof, sold and conveyed parcels of said land at prices far or at all below the value thereof, nor have defendants sustained any damage by any sales made by plaintiff.

Fifth. The plaintiff has not, with intent to have an accumulation of interest upon said note and mortgage or at all, willfully refused to make sales of portions of said land, of portions of the Guadalupe rancho, or any other, when he had opportunities so to do at fair prices, nor have defendants suffered any loss or damage by any refusal of plaintiffs to sell any lot or parcel.

Sixth. The provision of said mortgage providing for the allowance to plaintiff of two and one-half per cent. commissions is not unreasonable or unconscionable nor against equity.

Seventh. That said plaintiff has not used or employed any injudicious or improper manner of making sales of portions of said land, or without regard to the effect on the surroundings or adjacent portions thereto, nor has he by the sales made by him rendered such adjacent portions comparatively worthless or unsalable, or any less valuable or salable.

Eighth. That I have taken and stated the account of the dealings between the plaintiff and defendants arising out of said mortgage and deed of trust, and in said accounting I have charged the plaintiff with all and singular the moneys received by him from sales of property and leases and with all other moneys received by the plaintiff to the use of or on account of defendants or either of them. I find that the original amount of indebtedness was, as before stated, four hundred and forty-six thousand six hundred and ninety-nine dollars and fourteen cents ($446,699.14); that the plaintiff has made further advances to the amount of one hundred and thirty-two thousand five-hundred and five dollars and seventy-eight cents ($132,505.78); that the interest on the indebtedness amounts to five

hundred and eighty-nine thousand six hundred and twenty-six dollars and four cents ($589,626.04); that the commissions on the sales of property made by plaintiff amount to eleven thousand three hundred and eleven dollars and eighty-nine cents ($11,311.89); that the amounts received by plaintiff to the credit of defendants amount to four hundred and forty-four thousand eight hundred and
589 eighteen dollars and sixty-four cents ($444,818.64); and the amount of debts which plaintiff elects to take to his own account amounts to thirty-two thousand seven hundred dollars and fifty-five cents ($32,700.55); and I find that after making all proper charges and credits, including the debts secured by mortgage or otherwise taken to his own account by said plaintiff, there remains due to the plaintiff the sum of seven hundred and two thousand six hundred and twenty-three dollars and sixty-six cents, payable in United States gold coin.

Ninth. That there remains unsold of the property conveyed by said trust deed the property set forth in Schedule V and made part hereof, and that there is in the hands of said plaintiff notes, mortgages, and other securities, received by him on account of the trust property sold and other assets held by him as trustee, which are set forth in Schedule V and said Schedule V is a true list of all the property in the hands of the plaintiff, subject to sale, to satisfy the amount due to him.

Conclusions of Law.

I decide that the plaintiff was not entitled to charge the defendants the amounts paid by him to others as commissions upon sales made, and I have therefore excluded all such items from the account.

I decide that the plaintiff is not entitled to deduct from the receipts his commissions upon the amount of sales made, but said commissions are only to be paid out of the surplus remaining after the principal and interest is paid, and I have therefore admitted the said item at the foot of the account.

I decide that the lots sold by the plaintiff and mortgage to him to secure the purchase-money and surrendered or reconveyed to him by the purchasers are subject to the same trusts as they were originally, and are to be sold the same as the land which has never been sold. "Plaintiff's Exhibit U," thereto annexed and made part hereof, is a list of such lands.

I decide that certain swamp lands purchased by the plaintiff, by reason of their situation, relative to the San Leandro rancho and other swamp lands described in and conveyed by the trust deed, were at the option of the defendants to be treated as trust property, and the cost of puachase charged against them; and they having
590 so elected at the hearing before me, I have included the cost of purchase in the account, and included said lands in the lands to be sold under the decree herein, and the same are included in Schedule V.

I decide that the plaintiff is entitled to a judgment, in the usual form of decrees for the foreclosure of mortgage, directing all of the premises conveyed by said trust deed remaining unsold, and the

said swamp land purchased by the plaintiff and included in said Schedule V, and the lands once sold and subsequently surrendered or reconveyed to plaintiff for unpaid purchase-money set forth in Schedule U, hereto annexed, and the notes and mortgages and debts due for purchase-money of lots sold and remaining unpaid and other assets, and all the property set forth in said Schedule V, or so much thereof as may be necessary, to be sold at public auction in the counties, respectively, where said property is situate, the real estate and the debts secured by mortgage or other lien on real estate in the county where the land is situate, and in the same manner and form as in sales upon execution, and the other personal property in the county of Alameda, in like manner and form as like property sold on execution; that out of the proceeds of sale be paid, first, the costs and expenses of sale; second, the costs and expenses of this suit as taxed; third, the amount so as aforesaid found due to the plaintiff for principal and interest, with interest thereon at the rate of seven per cent. per annum from the date of the judgment, all in gold coin of the United States, so far as the amount of said proceeds of sale will suffice, and that the surplus, if any, shall be paid to the defendants, and, if it appears from the return that the proceeds are insufficient and a balance still remains due, that the judgment then be docketed for such balance against the defendants and each of them, and that execution issue therefor; and that from and after the execution and delivery of the deed that the said defendants and each of them be barred and foreclosed of all right or equity of redemption of said real estate and every parcel thereof, and that any party to the suit may bid and become purchaser at any sale under the judgment.

In making said sales the block number 32, bounded by Davis, Carpentier, Estudillo, and Ward streets, and the block known and designated as Court Square, bounded by Davis, Estudillo, Martinez, and Ward streets, according to the original map of the town
591 of San Leandro, shall be sold after all the property, except said two blocks, has been sold.

Dated April 15, 1878.

JOHN B. MHOON, *Referee.*

592 *Judgment.*

(Title of court and cause.)

This cause came on to be tried before John B. Mhoon, Esq., to whom it was referred to hear and decide the whole issue, and to report a finding and judgment therein, and the said referee having heard and decided the whole issue and reported a finding and judgment therein: Now upon reading and filing the findings of fact and conclusions of law in writing filed on the twenty-second day of April, A. D. one thousand eight hundred and seventy-eight, and upon motion of Benjamin S. Brooks, Esq., attorney for the plaintiff:

593 It is ordered, adjudged, and decreed that there is now due to the plaintiff herein, for principal, interests, and commis-

sions, under the trust deed, a copy whereof is annexed to the complaint and marked Exhibit A, the sum of seven hundred and sixty-six thousand five hundred and seventy-seven dollars and cost of this suit, taxed at the sum of fifteen hundred dollars, said sums amounting in the aggregate to seven hundred and sixty-eight thousand and seventy-seven dollars, and that the same bear interest from the date hereof, at the rate of seven per cent. per annum, and that the same be payable in gold coin of the United States.

It is further ordered, adjudged, and decreed that all and singular the property subject to the trust and to the payment of the said date, including all of the property conveyed by said trust deed remaining unsold, and the swamp land purchased by plaintiff, and the lands once sold and subsequently surrendered and reconveyed to plaintiff for unpaid purchase-money, and the notes and mortgages and debts due for purchase-money of lots sold, and all the property assets and effects in the plaintiff's hands as trustee, which is hereinafter specifically described, or so much thereof as may be necessary to raise the amount so found to be due to the plaintiff, as aforesaid, and the costs in this suit, and expenses of sale, be sold at public auction by the commissioner for that purpose appointed. That, before making such sales, the commissioner shall give notice of such sale by publication in some newspaper published in the county where the sale is to be made, and by posting, and in such other way as he may think best. The notice shall contain a description of the property to be sold, as given herein, with the time and place of sale. The real estate shall be sold at the court-house door of the county where it is situate, and all the rest of the property shall be sold at the door of the court-house, in the county of Alameda, and the notice of sale of the real estate shall be published at least three weeks.

That at such sale the plaintiff and any and all others, whether parties to this suit or not, may bid and become purchasers upon compliance with the terms of sale. That said property be sold for cash, payable in United States gold coin. That after the sale is made said commissioner shall execute a deed to the purchaser, who shall thereupon become invested with the title in fee to said
594 real estate, and entitled to the immediate possession of the same, and to a writ of assistance or other process to place him in possession thereof.

And the said commissioners, after the making of said sale and receiving the purchase-money therefor, shall apply the same as follows: 1st. To the payment of the expenses of the sale, including therein one per cent. upon the amount of sales for compensation for their own services as such commissioners. 2nd. To the payment of the costs and expenses of the action. 3rd. To the payment of the amount so as aforesaid found due to the plaintiff with interest. The balance, if any, he shall pay into court to abide the further order of the court.

And it is further ordered, adjudged, and decreed that each commissioner make report of his doings herein, and if upon the coming in and confirmation of the reports it appear that there is a deficiency

in the proceeds of sale and that there still remains a balance due and unpaid to said plaintiff, then that this judgment be docketed for such deficiency, and that plaintiff have execution therefor.

The property which is ordered, adjudged, and decreed to be sold by said commissioner is as follows:

Schedule of subdivisions of the rancho Guadalupe which were sold by Theodore Le Roy, for the purchase price of which, in whole or in part, mortgages were received by him, and which were afterwards reconveyed to him by the purchaser or their assigns—that is to say:

Subdivision No. 14, reconveyed by Milus King McCorkle by deed dated October 16, 1875, recorded in Santa Barbara records, in Book P of Deeds, page 199.

Subdivision No. 54, reconveyed by Frank Fritters by deed dated Oct. 1, 1877, recorded in San Luis Obispo county records, in Book J of Deeds, page 255.

Subdivision No. 53, reconveyed by Henry Kleine by deed dated Oct. 9, 1877, recorded in San Luis Obispo county records, in Book J of Deeds, page 257.

Subdivision No. 40, reconveyed by Jose Ramon Estudillo by deed dated Oct. 1, 1877, recorded in San Luis Obispo county records, in Book J of Deeds, page 261.

Subdivision No. 51, reconveyed by Hiram Van Gundy by deed dated October 1, 1877, recorded in San Luis Obispo county records, in Book J of Deeds, page 258.

Subdivision No. 25 and the western half of subdivision No.
595 26 reconveyed by John W. Emrich by deed dated December 18, 1876, recorded in San Luis Obispo county records, in Book I of Deeds, page 332.

The south half of subdivision No. 36, reconveyed by John Nietto and Manuel Nietto by deed dated April 11, 1877, recorded in San Luis Obispo county records, in Book I of Deeds, page 552; and the north half of said subdivision No 36, except a piece 200 feet square in the northeast corner thereof, reconveyed by Michael Matthews by deed dated October 1, 1877, recorded in San Luis Obispo county records, in Book J of Deeds, page 259.

Schedule of the property held by Theodore Le Roy, April 15, 1878, under the deed of trust of Juana M. Estudillo and others to him, dated October 1, 1870, which includes the foregoing:

A. Real property in the county of Alameda, being portions of the rancho San Leandro:

1. Blocks and lots in the town of San Leandro, as the same are designated on the original map of said town, filed in the county recorder's office of Alameda county February 27, 1855.

The block No. 32, bounded by Davis, Carpentier, Estudillo, and Ward streets.

The block known and designated as "Court Square," bounded by Davis, Estudillo, Martinez, and Ward streets.

The block No. 50, bounded by Davis, Martinez, Ward, and Alvarado streets, except the strip of land 60 feet in width heretofore con-

veyed by Theodore Le Roy to the Central Pacific Railroad Company.

The southern half of the block No. 31; lot E in block No. 30.

2. Lots in East San Leandro, as delineated on the map of East San Leandro, filed in the county recorder's office of Alameda county February 20, 1871.

Lots No. 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35 in the block No. 3; lots No. 3, 4, 5, 7, and 8 in block No. 6; lot No. 2 in block No. 9.

3. Lots in the Estudillo tract, as delineated on the map thereof, filed in the said county recorder's office January 10, 1876.

Lots No. 4, 5, 6, 7, and 8, and the eastern half of lot No. 3 in block No. 12. Block No. 13, except the lots Nos. 24, and 25; blocks
596 Nos. 14, 21, 22, 29, 30, 34, 35, 38, 39, 48, 49, 53, 54, 55, 58, 67, 70, 71, the easterly half of block No. 28, comprising the lots Nos. 7 to 18, both inclusive, and the eastern half of block No. 31, comprising the lots Nos. 1 to 12, both inclusive.

4. The piece of land in the town of San Leandro bounded by Watkins street, Ward street, and Hayward avenue.

5. The piece of land known as the Hill Tract of the San Leandro rancho, bounded and described as follows, to wit: Commencing at the north corner of a piece of land containing 116 acres, formerly sold to one Carroll, and running thence southeasterly, along said land of Carroll and the lands formerly sold to T. Phillips and A. H. Phillips, to the land formerly sold to A. Johnson; thence easterly along said Johnson's line to the land sold by Theodore Le Roy to W. T. Lemon; thence northeasterly along said Lemon's line to the easterly boundary of said rancho San Leandro; thence northerly along said boundary to the centre of San Leandro creek; thence down said creek to its intersection with the centre of the county road, or Estudillo avenue extended; thence westerly along the centre of said road to a point opposite the land sold by Theodore Le Roy to John H. Gilmore and Thomas P. Gilmore; thence southerly and westerly along the land of said Gilmore, and of the land sold by said Le Roy to Thomas O'Neil, to Grand avenue; thence southerly and westerly along the eastern line of the piece of land containing 11.60 acres, sold by said Le Roy to Mrs. Juana M. Estudillo, to Grand avenue again; thence southerly along Grand avenue, and westerly along Sybil street, as laid down on the map of the Estudillo tract, to the point of commencement, containing 571 acres, be the same more or less, excepting thereform the piece of land sold by said Le Roy to Joseph S. Allemany, containing 7.59 acres, used as a cemetery, and excepting, also, a roadway for public use, granted by said Le Roy and Estudillo family to California Water Company, by deed recorded in Alameda county records, in Liber 95 of Deeds, page 473.

6. The tract of land, portion of said rancho San Leandro, bounded and described as follows, to wit: Beginning at a stone monument in the center of Menlo street, and at the northeast corner T. W. Mulford's land, running thence south 62½ deg. west along said Mulford's line, and parallel to the line of First avenue, 3,892.70

597 feet to a point in the western boundary of said rancho San Leandro; thence along the patent line of said rancho as follows: North 11 deg. west 1,726 feet, north 79 deg. west 330 feet, north 7 deg. east 750 feet to the south line of a tract of land now or formerly of one Gansberger; thence north 70 deg. 08 min. east along the line of said Gansberger, and of land now or formerly belonging to Demont and Nichols, 4,718.71 feet to the northwest corner of land sold by Theodore Le Roy to Dennis Sullivan; thence south 27½ deg. east along said land of Sullivan, 1,230.40 feet to the north line of Williams street as proposed; thence south 62½ deg. west along said line of street, 1,439.50 to the centre of Menlo street as proposed; thence south 27½ deg. east along the centre of Menlo street 622.39 feet to the place of beginning, containing 232.01 acres, according to the survey of W. F. Boardman.

7. The tract of land, portion of the said rancho San Leandro, bounded and described as follows, to wit: Beginning at a point in the northern line of First avenue distant south 62½ west 1,073.39 feet from the southwest corner of the tract of 150 acres of J. B. Ward and children, running thence south 62½ deg. west along the northern line of said First avenue 2,067 feet; thence north 27½ deg. west along the eastern line of Menlo street 1,325 feet; thence north 62½ deg. east along the southern line of Williams street 2,067 feet; thence south 27½ deg. east along the western line of Merced street 1,325 feet to the place of beginning, containing 62.87 acres.

8. The tract of land, portion of said rancho San Leandro, bounded and described as follows, to wit: Beginning at the intersection of the southern line of First avenue and the western line of John B. Ward's tract of 100 acres; thence running south 27½ deg. east along said Ward's line and center of Mariposa street 1,000.85 feet; thence south 62½ deg. west to and along John Buckley's north line 1,070 feet to Buckley's northwest corner; thence north 27.10 west along Siqueira's east line 1,000.85 feet to the south line of first avenue; thence north 62½ deg. east along the line of said avenue 1,070 feet to the place of beginning, containing 24.58 acres.

598 9. The tract of land, portion of said rancho San Leandro, bounded and described as follows, to wit: Beginning at a stone monument, set at the intersection of the centre line of Menlo street with the centre line of Second avenue, the same being the southeast corner of T. W. Mulford's land, running thence north 27½ deg. west along the center of said Menlo street and line of said Mulford 1,038.03 feet to the southwest corner of B. Glancey's land; thence north 62¼ deg. east along said Glancey's land and the south line of Siqueira's land 3,197 feet to John Buckley's northwest corner; thence south 27½ deg. east along Buckley's west line 1,000.85 feet to the north line of Second avenue; thence north 62½ deg. east along Buckley's south line and line of said avenue 1,070 feet to the land of J. B. Ward; thence south 27½ deg. east along the centre of Mariposa street 30 feet to the centre of Second avenue and southwest corner of said land of Ward; thence north 62½ deg. east along the center of Second avenue and south line of said Ward and one Cushing 3,336.97 feet to the westerly line of the right of way of the Cen-

tral Pacific railroad; thence south 42 deg. east along the line of said right of way 2,272.31 feet to land now or late of L. Stone; thence along the lines of said Stone as follows, to wit: South 62½ deg. west 1,777.19 — to Stone's northwest corner; thence south 27 deg. 28 min. east 1,021 feet; thence north 62½ deg. east 58.60 feet; thence south 27½ east 1,162.47 feet to the southwesterly corner of said Stone and the north line of the tract formerly conveyed to John Wood; thence along the line of said Wood and land formerly conveyed to one Adams, north 89 deg. 50 min. west 3,062.13 feet to said Adams' northwest corner; thence south 6 deg. east along Adams' west line 2,097 feet to land heretofore conveyed to Hansen and Matson; thence south 88 deg. 10 min. west 1,392.50 feet to the northwest corner thereof; thence south 60 deg. 5 min. east 629 feet; thence south 31¾ deg. west 367.40 feet; thence south 32 deg. west 292.60 feet to the westerly corner thereof; thence south 56 deg. east 762.80 feet; thence south 48¼ deg. east 602 feet; thence south 50¼ deg. east 448 feet; thence south 71 deg. east 824 feet to the southeast corner of said Hansen and Matson's land; thence south 2½ deg. east along the track formerly conveyed to one Olsen, 135 feet to the southwest corner thereof; thence south 14¾ deg. east 1,840 feet to the north
599 line of road from San Lorenzo to Roberts' Landing; thence south 72 deg. west along the line of said road 847.42 feet to the westerly patent line of said rancho San Leandro; thence along said patent line as follows, to wit: North 33¼ deg. west 5,757.86 feet; south 88¼ deg. west 2,791.80 feet; north 45¼ deg. west 2,343 feet; south 85¾ deg. west 221.63 feet to ast one monument in the centre of Second avenue extended, and a corner of the land of T. W. Mulford; thence north 62½ deg. east along the center of said avenue and said Mulford's line 3,069.66 feet to the place of beginning, containing 1,013.71 acres.

10. All the estate, right, title, and interest remaining in the plaintiff in the rancho San Leandro after sales which have heretofore been made by him and sales of the parcels hereinbefore described, which rancho is in said deed of trust described as follows, viz:

All that certain tract of land or property known as the rancho San Leandro, in Alameda county, State of California, being the same rancho heretofore granted by the Mexican Government to José Joaquin Estudillo.

B. Real property in the county of Alameda, lying west of and adjoining the rancho San Leandro.

The tract of land bounded and described as follows, to wit:

Beginning at a point in the south line of the land of T. W. Mulford where the line between sections 3 and 10, township 3 south, range 3 west, intersects the shore line of the bay of San Francisco; running thence east between said sections three and ten 49.10 chains to a point where said line intersects the patent line of the said rancho San Leandro; thence following the boundaries of said rancho, as follows, viz:

North 88¼ deg. east 35.76 chains, south 33¼ deg. east 17.43 chains to the east line of lot number 6, in section 11, township 3 south, range 3 west, as appears by sale map number 10 of salt-marsh and

tide lands by State tide-land commissioners; thence south 7.30 chains to the southeast corner of said lot No. 6; thence west 10 chains to the southeast corner of marsh-land survey No. 206; thence south along the east boundary of survey of marsh lands No.
600 223 40 chains; thence west 20 chains to the southeast corner of marsh-land survey No. 119; thence north 20 chains to the northeast corner of said survey; thence west 20 chains to the northwest corner of said survey; thence south 20 chains to the southwest corner of said survey; thence east 20 chains to the southeast corner of said survey; thence south 17.95 chains to the bay of San Francisco; thence meandering along the margin of said bay as per survey of marsh land No. 223 and 208, as follows, viz: North 78 deg. west 1.50 chains; north 32¼ deg. west 16 chains; north 79¾ deg. west 20.28 chains; north 28¼ deg. west. 13 chains; north 20¼ deg. west 10 chains; north 24¾ deg. west 16.2 chains; north 52¼ deg. west 17 chains; north 20 deg. west 16 chains to the place of beginning, containing 392.97 acres, and comprising marsh-land surveys Nos. 208, 223, and 206, and lot 6, section 11, township 3 south, range 3 west, as per map of the State tide-land commissioners.

C. Real property in the county of Santa Barbara, being the tract of land described in the said deed of trust as follows, viz: That certain rancho or tract of land situate in the county of Santa Barbara, State of California, and known as the Casmalia rancho, being the same land which was granted to Antonio Olivera by the Mexican government.

D. Real property in the county of Santa Barbara, being portions of the rancho Guadalupe, as surveyed, subdivided, and platted by James T. Stratton in November, 1871—that is to say:

1. Subdivisions numbers 14, 100, 110, 111, 119, 124, 127, 128, 129, 140, 141, 142, 158, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 103, 104, 105, 115, 116, 117, 118, 121, 122, 123; the residue of subdivisions numbers 133, 134, and 135 after the sales by said Le Roy of a tract of 1,000 acres to Charles J. Clayton, and of a tract of 62 acres to Z. B. Haywood and S. H. Harmon; also that part of the bed of the Santa Maria river which is not included in the subdivisions surveyed and platted by said James T. Stratton and lies in said county of Santa Barbara.

2. Lots in subdivision No. 143 of said rancho Guadalupe, according to the map compiled by G. H. Thompson in September, 1875, viz: Lots 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 38, 39, 40, 41, and 42.

601 3. Lots Nos. 6 and 7, in subdivision No. 145, of said rancho Guadalupe, according to said Thompson's map.

4. That part of subdivision No. 144 of said rancho Guadalupe, which, according to said Thompson's map, lies east of Peralta street of the town of Guadalupe.

5. Lots and blocks in the town of Guadalupe, part of said rancho Guadalupe, according to the said map, compiled by G. H. Thompson in September, 1875, viz:

Lots Nos. 1, 2, 3, 4, 5, 6, and 7, in block No. 2; lots Nos. 1, 2, 3, 6, 7, and 8, in block No. 3; lots Nos. 7 and 8, in block No. 4; lot No.

7, in block No. 6; lots Nos. 14, 15, 16, 17, and 18, in block No. 8; lots Nos. 1, 2, 3, 4, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in block No. 9; the blocks Nos. 10 and 11; lots Nos. 1, 2, 3, 4, 5, 6, 8, 11, 15, 16, 17, 19, and 20, in block No. 12; lots Nos. 10 and 11, in block No. 13; lots Nos. 2, 3, 6, and 7, in block No. 14; block No. 15; lots Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, in block No. 16; lots Nos. 3, 6, 7, 10, 15, 16, 17, and 18, in block No. 18; lots Nos. 1, 2, 3, 4, 13, 14, 15, 16, 17, 18, 19, and 20, in block No. 19; block No. 20; lots Nos. 1, 2, 3, 4, 5, 6, 15, and 16, in block No. 21; lots Nos. 3, 4, 6, 7, 10, 15, 19, and 20, in block No. 22; lots Nos. 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, in block No. 23; block No. 24; also a lot lying west of and adjoining lots Nos. 1, 2, and 3, in block No. 3, being 150 feet in widths and 200 feet in depth; also a lot lying west of and adjoining lots Nos. 6, 7, and 8, in block Nos. 3, being 150 feet in width and 200 feet in depth; also a lot lying west of and adjoining lots Nos. 7 and 8, in block No. 4, being 100 feet in width and 200 feet in depth; also a lot lying west of and adjoining lots Nos. 4 and 5, in block No. 4, being 100 feet in width and 200 feet in depth.

6. All the estate, right, title, and interest remaining [in] the plaintiff in the rancho Guadalupe, after sales which have been heretofore made by him, and sales of the parcels hereinbefore described, lying in said county of Santa Barbara, which rancho is in said deed of trust described as follows, viz: All that certain rancho or tract of land situate in the county of Santa Barbara, State of California, and known as the Guadalupe rancho, being the same land which was granted to Diego Olivera and Teodore Arellanes by the Mexican government.

E. Real property in the county of San Luis Obispo, being
602 portions of the rancho Guadalupe, as surveyed, subdivided, and platted by James T. Stratton in Nov., 1871—that is to say:

1. Subdivisions Nos. 19, 29, 30, 31, 32, 33, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 53, 54, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 146, 147, 148, 149, 150, 151, 152, 153, and 25, the western half of subdivision No. 26; subdivision No. 36, except a piece 200 feet square in the northeast corner thereof, sold by Theodore Le Roy to the trustees of the Oso Flaco school district; subdivision No. 154, except a piece of 160 acres of river bed, sold by Theodore Le Roy to Salisbury; subdivision No. 162, except the part thereof included in the sale of Theodore Le Roy to Elias B. Woolley; also that part of the bed of the Santa Maria river which is not included in the subdivisions surveyed and platted by said James T. Stratton, and lies in said county of San Luis Obispo.

2. All the estate, right, title, and interest remaining in the plaintiff in that part of the rancho Guadalupe which lies in the county of San Luis Obispo, after sales which have heretofore been made by him, and sales of the parcels hereinbefore described, which rancho is in said deed of trust described as follows, viz: All that certain rancho or tract of land situate in the county of Santa Barbara, State of California, and known as the Guadalupe rancho, being the same

land which was granted to Diego Olivera and Teodore Arellanes by the Mexican government.

F. Notes secured by mortgages to Theodore Le Roy, recorded in the county recorder's office of Santa Barbara county, made to the following persons, to wit:

Patrick Hughes, dated Dec. 24, 1875, for $1,406.25, recorded in Book H, p. 180, on which there is due $1,406.25, with interest at 10 per cent. per annum from Dec. 1, 1875.

Patrick McGuckin, dated Oct. 22, 1875, for $1,387.50, recorded in Book F, p. 352, on which there is due $1,387.50, with interest at 10 per cent. per annum from Nov. 1, 1876.

John Fleming, dated Feb. 1, 1876, for $966, recorded in Book G, p. 191, on which there is due $724.50, with interest at 10 per cent. per annum from Dec. 1, 1876.

603 H. A. Laughlin, dated Dec. 18, 1876, for $2,400, recorded in Book G, p. 596, on which there is due $2,400, with interest at 12 per cent. per annum from Nov. 1, 1876.

James A. Norris, dated Nov. 1, 1876, for $2,200, recorded in Book G, p. 590, on which there is due $2,200, with interest at 12 per cent. per annum from Nov. 1, '76.

William Douglass, dated Nov. 1, 1876, for $3,200, recorded in Book G, p. 593, on which there is due $3,200, with interest at 12 per cent. per ann. from Nov. 1, 1876.

S. D. Triplett, dated Nov. 1, 1876, for $2,400, recorded in Book G, p. 587, on which there is due $2,400, with interest at 12 per cent. per ann. from Nov. 1, 1876.

Michael O'Neil, dated Nov. 1, 1876, for $2,450, recorded in Book H, p. 321, on which there is due $2,450, with interest at 12 per cent. per ann. from Nov. 1, 1876.

B. O. Walker, dated Nov. 1, 1876, for $3,000, recorded in Book H, p. 388, on which there is due $3,000, with interest at 12 per cent. per ann. from Nov. 1, 1876.

E. J. Preston, dated Nov. 1, 1876, for $8,000, recorded in Book H, p. 393, on which there is due $8,000, with interest at 12 per cent. per ann. from Nov. 1, 1876.

Frederick Tittel, dated March 31, 1876, for $835, recorded in Book I, p. 9, on which there is due $835, with interest at 10 per cent. per ann. from Nov. 1, 1876.

William L. Stephens, dated Oct. 15, 1875, for $3,075, recorded in Book F, p. 372, on which there is due $2,700, with interest at 10 per cent. per ann. from Nov. 1, 1876.

John Jinkins and Wm. Graham, dated Oct. 27, 1875, for $4,480, recorded in Book F, p. 345, on which there is due $4,144, with interest at 10 per cent. per ann. from Nov. 1, 1876.

Sylvester Righetti, dated Sept. 27, 1877, for $2,062.50, recorded in Book I, page 342, on which there is due $2,062.50, with interest at 10 per cent. per ann. from Nov. 1, 1877.

Samuel Hopkins, dated Jan. 30, 1877, for $1,012.50, recorded in Book I, p. 326, on which there is due $1,012.50, with interest at 10 per cent. per ann. from Nov. 1, 1876.

C. P. Mathison, dated January 26, 1874, for $2,560, recorded in

Book E, p. 118, on which there is due $1,706.67, with interest at 10 per cent. per. ann. from Nov. 1, 1876.

Thomas Sands Brown, dated Oct. 2, 1873, for $7,821, recorded in Book D, p. 75, on which there is due $5,700, with interest at 10 per cent. per ann. from June 26, 1877.

604 Thomas G. Riggs, dated Oct. 25, 1873, for $2,000, recorded in Book D, p. 144, on which there is due $1,874.76, with interest at 10 per cent. per ann. from Aug. 20, 1877.

Samuel R. Rogers, dated Oct. 25, 1873, for $1,000, recorded in Book D, p. 136, on which there is due $937.38, with interest at 10 per cent. per ann. from Aug. 20, 1877.

Elias B. Woolley, dated Oct. 25, 1873, for $2,000, recorded in Book D, p. 139, on which there is due $1,874.76, with interest at 10 per cent. per ann. from Aug. 20, 1877.

Giacomo Toquazzini, Antonio Toquazzini, and Battista Pezzoni, dated Sept. 24, 1875, for $17,800, recorded in Book F, p. 407, on which there is due $17,800, with interest at 10 per cent. per ann. from Nov. 1, 1876.

John Ormond and Jerry Sheehy, dated Oct. 1, 1875, for $4,125, recorded in Book F, p. 445, on which there is due $4,125, with interest at 10 per cent. per ann. from Nov. 1, 1876.

Martin Perry Hudson, dated Oct. 2, 1875, for $4,500, recorded in Book F, p. 303, on which there is due $4,500, with interest at 10 per cent. per ann. from Nov. 1, 1875.

Luis D. Estudillo, dated April 25, 1876, for $5,500, recorded in Book G, page 250, on which there is due $5,500, with interest at 10 per cent. per ann. from Dec. 31, 1875.

Samuel B. Lardner, dated Feb. 10, 1875, for $5,950, recorded in Book E, page 525, on which there is due $5,450, with int. at 10 per cent. per ann. from Dec. 31, 1876.

Michael Fox and Frederick Shutter, dated Oct. 12, 1875, for $2,935, recorded in Book G, page 27, on which there is due $2,925, with interest at 10 per cent. per ann. from Nov. 1, 1875, less $146.25.

Thomas Archer Brown, dated Oct. 2, 1873, for $2,533.50, recorded in Book D, page 71, on which there is due $2,533.50, with interest at 10 per cent. per ann. from Nov. 1, 1876.

Jeremiah Donovan and Jerry Sheehy, dated July 23, 1873, for $6,000, recorded in Book D, page 17, on which there is due $6,000, with interest at 10 per cent. per ann. from Nov. 1, 1875.

605 William J. Williamson, dated Mar. 23, 1877, for $5,600, recorded in Book H, page 573, on which there is due $5,600, with interest at 10 per cent. per ann. from Nov. 1, 1876.

Mortgage without a note of Charles J. Clayton, dated April 9, 1874, for $4,000, recorded in Book D, page 528, on which there is due $2,000, with interest at 10 per cent. per ann. from April 9, 1875.

G. Notes secured by mortgages to Theodore Le Roy, recorded in the county recorder's office of San Luis Obispo county, made by the following persons, to wit:

John Newlove, dated May 31, 1873, for $7,400, recorded in Book B of Mortgages, page 601, on which there is due $6,951.67, with interest at 10 per cent. per ann. from Jan. 29, 1877.

Thomas Hourihane, dated Aug. 13, 1875, for $5,355, recorded in Book D, page 53, on which there is due $3,612.65, with interest at 10 per cent. per ann. from May 10, 1876, and $35.61 for taxes paid Jan. 3, 1878.

Irvine Johnson, dated Oct. 4, 1873, for $4,630, recorded in Book B, page 727, on which there is due $3,500, with int. at 10 per cent. per ann. from Nov. 1, 1877.

George C. Cocke, dated Oct. 18, 1875, for $3,000, recorded in Book D, page 173, on which there is due $2,250, with interest at 10 per cent. per ann. from Nov. 1, 1876.

George C. Cocke, dated Oct. 14, 1876, for $1,500, recorded in Book E, page 63, on which there is due $1,500, with interest at 10 per cent. per ann. from Nov. 1, 1876.

José Vincente Estudillo, dated Jan. 6, 1874, for $2,155, recorded in Book C, page 144, on which there is due $2,155, with interest at 7 per cent. per ann. from Nov. 1, 1873.

John Biggs, dated Oct. 4, 1873, for $2,300, recorded in Book B, page 738, on which there is due $2,300, with interest at 10 per cent. per ann. from Nov. 1, 1876.

Elias San-om, dated Aug. 20, 1873, for $2,100, recorded in Book B, page 741, on which there is due $2,100, with interest at 10 per cent. per annum from Nov. 1, 1875, less $31.68.

William Van Gundy, dated Aug. 1, 1873, for $1,800, recorded in Book B, page 634, on which there is due $1,350, with interest at 10 per cent. per ann. from Nov. 1, 1874, and $35.05 for taxes paid Mar. 2, 1877.

Antonio Feliciano, dated April 30, 1874, for $2,025, recorded in Book C, page 58, on which there is due $2,025, with interest at 10 per ceent. per ann. from Nov. 1, 1874.

606 Francisco G. da Silva, dated April 30, 1874. for $2,550, recorded in Book C, page 55, on which there is due $2,550, with interest at 10 per cent. per annum from Nov. 1, 1874, and $13.50 for taxes paid Jan. 14, 1878.

Irving McGuire, dated Aug. 28, 1874, for $2,200, recorded in Book C, page 169, on which there is due $2,200, with interest at 10 per cent. per annum from Nov. 1, 1875.

Archibald McKechine, dated Oct. 25, 1873, for $1,700, recorded in Book B, page 730, on which there is due $1,700, with interest at 10 per cent. per annum from Nov. 1, 1874, and $19.32 for taxes paid January 14, 1878.

Hypolite Dutard, dated Dec. 23, 1875, for $2,500, recorded in Book E, page 259, on which there is due $2,500, with interest at 10 per cent. per annum from Nov. 1, 1875.

H. Promissory notes, payable to the order of Theodore Le Roy, made by the following persons, to wit:

José Estacio Correa, dated Nov. 1, 1877, for $260.50, payable 5 months after date, with interest at one per cent. per month.

Ventura Joseph, dated Nov. 1, 1877, for $200, payable 5 months after date, with interest at one per cent. per month.

Antonio Olivera, dated Nov. 1, 1877, for $1,171.50, payable June 1, 1878, with interest at one per cent. per month.

J. H. Sherley, dated January 21, 1875, for $80, payable eight months after date, with interest at one per cent. per month.

W. Bryant, dated Nov. 1, 1874, for $85, payable one day after date, with interest at 1¼ per cent. per month.

Luis D. Estudillo, dated Nov. 1, 1872, for $40, payable on demand, with interest at 1¼ per cent. per month.

Luis D. Estudillo, dated April 10, 1873, for $50, payable on demand.

Luis D. Estudillo, dated April 11, 1873, for $55, payable on demand.

L. D. Estudillo and Juan Arellanes, dated Nov. 6, 1875, for $52.50, with interest at one per cent. per month, payable April 1, 1876.

Luis D. Estudillo, dated April 25, 1876, for $125, payable Sept. 1, 1876.

607 Wm. Van Gundy, dated Nov. 1, 1875, for $60, payable one day after date, with interest at one per cent. per month.

S. S. Miller and A. Miller, dated Jan. 19, 1877, for $102.25, payable on demand, with interest at one per cent. per month.

J. W. Jones, dated Jan. 11, 1877, for $153.50, payable on demand, with interest at one per cent. per month.

Geo. C. Cocke, dated Jan. 22, 1877, for $150, payable June 1, 1877, with interest from maturity at one per cent. per month.

Adam Smith, dated Jan. 22, 1877, for $215.70, payable on demand, with interest at one per cent. per month.

M. Fox, dated March 30, 1877, for $262.50, payable on demand, with interest at one per cent. per month.

Elijah Bryan, dated Feb. 1, 1877, for $185.40, payable on demand, with interest at one per cent per month.

W. A. Schacht, dated Nov. 1, 1876, for $180, payable on demand, with interest at one per cent. per month.

Daniel Sanslow, dated July 2, 1877, for $162, payable on demand, with interest at one per cent. per month.

Thomas Saulsbury, dated Oct. 11, 1877, for $150, payable Nov. 1, 1878, with interest after maturity at one per cent. per month.

C. W. Merritt, dated Nov. 8, 1877, for $40, payable 5 months after date, with interest from maturity at one per cent. per month.

C. P. Mathison, dated Feb. 1, 1878, for $100, payable Nov. 1, 1878, with interest after maturity at one per cent per month.

Thomas Gormley, dated Feb. 11, 1878, for $700, payable May 15, 1878, with interest from maturity at one per cent. per month.

Wm. T. Scott, dated March 6, 1878, for $450, payable June 1, 1878, with interest from maturity at one per cent. per month.

C. P. Mathison, dated Nov. 24, 1877, for $40, payable Nov. 1, 1878.

No payments have been made on any of the foregoing promissory notes.

J. Promissory notes payable to the order of Theodore Le Roy, on hich partial payments have been received, made by the following persons, to wit:

608 Luis D. Estudillo, dated Nov. 18, 1872, for $250, payable

4 months after date, on which there was paid on account $120 on June 15, 1875.

Abner Bryan, dated Nov. 1, 1875, for $102, payable one year after date, with interest at one per cent. per month, on which there was paid $6.46 on Aug. 28, 1876.

K. Debts owing to Theodore Le Roy by the following persons, to wit:

Joseph Correa, at San Leandro, $157 for balance of rent, payable in advance, for the season 1877–'78.

Arthur Keefe, at San Leandro, $250 for balance of rent, payable in advance, for the season 1877–'78.

L. Judgment recovered by Theodore Le Roy against Antonio Aguayo and Augustus D. Splivalo, in the district court of the fifteenth judicial district, California, in and for the city and county of San Francisco, for $788.48, with interest at 7 per cent per annum from November 9, 1875, and $17.25 for costs of suit.

M. Claim for mesne profits now in litigation in the case of Theodore Le Roy *v.* T. B. Jamison *et als.*, in the circuit court of the United States.

And it is further ordered and decreed that Robert L. McKee, court commissioner of this court, be, and he hereby is, appointed commissioner to make sale of all property herein ordered to be sold in Alameda county; and that Benjamin H. Brooks be, and hereby is, appointed commissioner to make sale of all the property herein ordered to be sold in Santa Barbara and San Luis Obispo counties.

And it is further ordered and decreed that in making said sales, the block numbered 32 (thirty-two), bounded by Davis, Carpentier, Estudillo, and Ward streets, and the block known and designated as Court Square, bounded by Davis, Estudillo, Martinez, and Ward streets, according to the original map of the town of San Leandro, shall be sold after all the property, except said two blocks, have been sold.

S. B. McKEE,
District Judge.

Endorsed: (Judgment.) Filed Jan. 10, 1879.

Judgment recorded in Book F, page 483.

609 *Order Denying Motion for New Trial.*

(Title of court and cause.)

JANUARY 10*th*, 1879.

This cause having been heretofore submitted to the court upon defendants' motion for a new trial, and the court having now fully considered the same, it is ordered that said motion be, and the same hereby is, denied, and on motion of defendants' attorneys a stay of proceedings for five days is ordered herein.

Decision of Motion for New Trial.

(Title of court and cause.)

The grounds of the motion made by defendants for new trial in this action are:

1. That plaintiff has no legal right to invoke the aid of court of equity, because by the deed of trust he was clothed with the legal ownership of the trust property for the purpose of paying the indebtedness acknowledged to be due him without recourse to law.

2. That it was not a case for a referee.

3. Errors committed by the referee in taking and stating the account between the plaintiff and defendants, in this:

1st. In charging defendants with $49,000, which the plaintiff had not paid for them.

2d. In charging them with expenses of surveys of land and repairs made upon the property.

3d. In charging them with commissions which are not yet payable.

4th. In charging them with notes and mortgages taken by plaintiff on sales of portions of the property.

As to 1st and 2d grounds: The action is one which involves the aubject of trust and account and the final disposition of trust property. Defendants themselves, by their answers, ask that the court shall take and state an account between the plaintiff, as trustee, and themselves as *cestuis que* trust, and dispose of the trust property according to the terms of the deed of trust.

Unquestionably the court has jurisdiction of these subjects
610 and can take and state the account, dispose of the trust property, and discharge the trustee; and under subdivision 1 of § 639 of the Code of Civ. Proc. it can of its own motion refer the case for the purpose of taking the account and trying issues of fact.

But the defendants themselves, as I have already stated, asked that the account be taken, and for that purpose the case was referred by consent of counsel.

As to the alleged errors committed by the referee, the most important are:

1st. In charging the defendants jointly with advances made to some of them individually.

2d. In charging them with $49,000, which the trustee has not paid.

But according to the testimony taken by the referee, the trustee had assumed to pay this last sum, after he had paid the indebtedness due to himself. Upon that assumption, the amount was included in the sum of $446,849, which the defendants acknowledge as an existing debt due to the plaintiff at the time of the execution of the deed of trust, and to secure payment of which the deed of trust was executed. Now, that debt, thus acknowledged and recited in the deed of trust, could not be attacked or reopened under the pleadings of this case, because the defendants have not, by their answers, attempted to deny the indebtedness for which the deed was executed, nor have they attempted to surcharge or falsify any of the

items which constitute the indebtedness, or to show any error, mistake, or fraud in the amount of that indebtedness, or any part thereof.

The deed was executed to secure payment of the entire sum, and every item composing the sum of the indebtedness. Counsel in his brief admits that the defendants intended and did convey to the plaintiff title to the trust property, to pay an indebtedness of $446.849. Now, although the particular item in controversy, or any others, may not have been actually paid, yet the trustee is bound by the deed of trust to pay it according to the terms of the deed under which he holds the property.

As to the objection that the defendants have been charged jointly with advances made to some of them individually, I find that defendants were all members of one family; that the advances made by the trustee were made for the benefit of the family, and that the moneys were given to individual members for that purpose,
611 under the provisions and covenants in the deed of trust, whereby they bound themselves to pay to the trustee all sums of money which he might advance to them, or any or either of them, or at the request of any or either of them. Some of these advances were of moneys for surveys and repairs or improvement of of property, and for one purpose and another. All the advances were set forth on exhibits annexed to the plaintiff's complaint, and made part of it.

The defendants do not deny them. They deny only the dates and the amounts of the advances, but these have been fully proved by the testimony.

I see nothing in the other objections. The trustee is entitled to the commissions allowed, although they are not yet payable by the terms of the trust deed.

The disposition made of the notes and mortgages or securities taken by the trustee upon sales made by him is, I think, proper under the terms of the trust, for while the trustee is invested with the legal ownership of the property and authorized to sell any portion of it on cash or credit to pay the indebtedness secured by it, the deed provides that the security taken on credit sales shall be held as trust property and sold, discounted, or disposed of by the trustee for the purpose of his trust. Upon that theory the referee seems to have acted—and I think correctly. The findings of the referee seem to be sustained by the affirmative and negative testimony in the case, and I therefore deny the motion for a new trial.

(Endorsed:) Filed January 10, 1879.

Notice of Appeal.

(Title of court and cause.)

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of the State of California from the judgment therein made and entered in the said district court on the 10th day of January, A. D. 1879, in favor of

the plaintiff and against said defendants, and from the whole thereof.

612 Also from an order of said court made and entered therein on the 10th day of January, A. D. 1879, denying defendants' motion for a new trial.

Dated this 15th day of January, A. D. 1879.

G. F. & W. H. SHARP,
Att'ys for Def'ts.

To the clerk of said district court and B. S. Brooks, Esq., attorney for plaintiff.

Endorsed: Service of a copy of the within notice of appeal admitted this 15th day of January, 1879. B. S. Brooks, pl't'ff's att'y. Filed Jan. 15, 1879.

Endorsed on cover: California C. C. U. S. No. 260. G. D. Newhall, appellant, *vs* E. J. Le Breton, administrator of the estate of Theodore Le Roy, deceased; Victor Le Roy, Georges Le Roy, and Eugene Le Roy, heirs-at-law of Theodore Le Roy, deceased. Filed August 17th, 1883.

119-257

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 260.

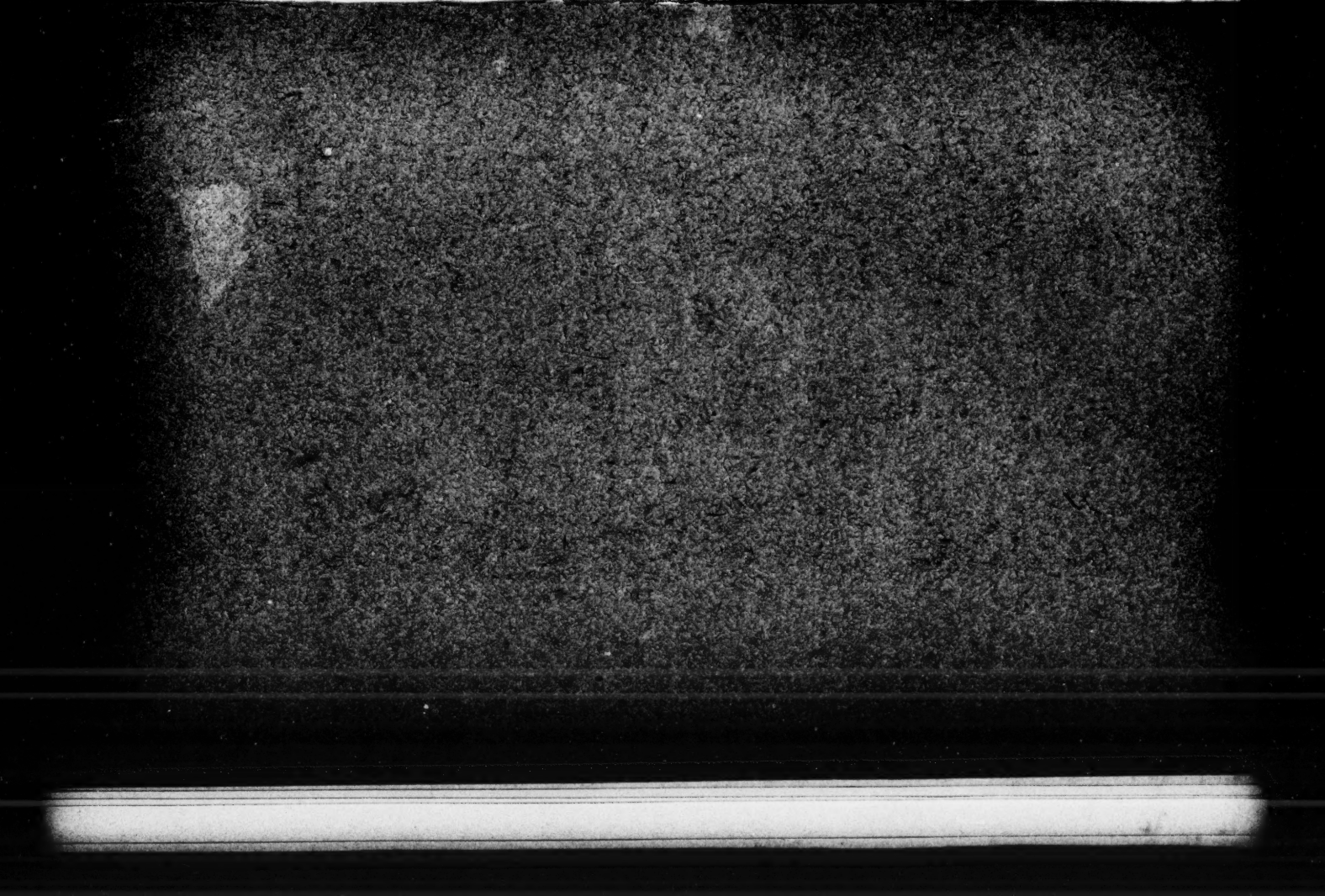
G. D. NEWHALL, APPELLANT,

vs.

ED. G. LE BRETON, ADM'R OF THEODORE LE ROY, ET AL.

Argument of Henry Beard and Chas. H. Armes, Attorneys for Appellant.

JUDD & DETWEILER, PRINTERS.



IN THE

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G. D. NEWHALL, APPELLANT,

vs.

ED. G. LE BRETON, ADM'R OF THEODORE LE ROY, ET AL.

Argument of Henry Beard and Chas. H. Armes, Attorneys for Appellant.

THE CASE.

The appellant filed his bill of complaint against Theodore Le Roy in the superior court of California for the county of San Francisco June 18th, 1880. On petition of said Le Roy the cause was removed to the circuit court of the United States for the district of California June 28th, 1880 (the defendant being a citizen of France and the plaintiff a citizen of the United States). Said defendant filed an answer to said bill July 31st, 1880 (Record, pp. 13 to 18), to which a replication was filed August 5th, 1880. (P. 19.) Testimony having been taken on both sides, the court, on the 20th of February, 1882, dismissed the bill without filing any opinion in the cause. (Rec., p. 20.) Said Le Roy having deceased on

or about April 8th, 1882, the present appellees were made parties defendant (pp. 104, 105), the cause was duly revived, and the appeal upon which the cause is now here was allowed, the bond was given (Rec., p. 106), and a citation was duly served. (Rec., p. 1.) The transcript was filed in the United States Supreme Court August 17th, 1883. (P. 229.)

THE BILL.

The bill avers that on or about the first day of October, 1870, one Juana M. Estudillo and others were indebted to said Le Roy in the sum of $397,849; to W. H. Patterson, $13,000; to S. M. Wilson and A. P. Crittenden, $13,000, and to John B. Felton, $23,000—a total indebtedness of $446,849—and to secure the payment thereof the said Estudillos made a certain deed of trust to said Le Roy, a copy whereof is set forth in said bill. Said deed of trust contains the following:

"Whereas the said parties of the first part are indebted to the said party of the second part in the sum of $446.849, gold coin of the United States, on which said sum said parties of the first part have agreed to pay to the said party of the second part interest at the rate of one and a quarter per cent. per month, payable in like gold coin, which said sum has been advanced by the said party of the second part to the said parties of the first part *on the agreements, undertakings, and conditions herein set forth*, and in which said sum is included the sum of $218,372.12, in gold coin, due by one John B. Ward to the Hibernia Bank, the payment of which the said party of the second part *has assumed* at the request of the said parties of the first part, and with the undertaking and agreement that said assumption shall be regarded as an advance at the date thereof of so much money by the said party of the second part to the said parties of the first part; and whereas the said parties of the first part have by this instrument conveyed and sold to the said party of the second part, his heirs, executors, and assigns, the real estate and personal property hereinafter described, and have agreed with the said party of the second part that he shall be clothed with the full powers of ownership of said real estate

and personal property *until, by the sale thereof, said indebtedness is fully paid*, or until the said indebtedness is otherwise fully paid by the said parties of the first part to the said party of the second part; and whereas the said parties of the first part have agreed that the said party of the second part shall have the irrevocable power, without recourse to law, to pay and reimburse himself the whole of his said indebtedness, principal and interest, out of the sales made by him of said real estate and personal property, and shall have full management, control, and disposition of the said real and personal estate as if the same belonged to him in full ownership:

"Now, therefore, this indenture witnesseth that the said parties of the first part, for and in consideration of the advances made to them as above set forth * * *" have granted, sold, and do sell, convey, etc., to said Le Roy, his heirs and assigns, forever, the real and personal property described, "upon and for the purpose of executing the following trusts, to wit:

First. * * * to pay insurance.

Second. * * * to pay taxes.

"Third. To sell the same or any parts or parcels thereof for cash, or for part cash and on credit, at public or private sale, with or without notice to the said parties of the first part, it being understood that said Le Roy may sell, discount, and dispose of all or any notes, mortgages, or securities taken for deferred payments, at his discretion; also to lease the same in parcels or as a whole.

"Fourth. *To pay off the said indebtedness hereinabove specified*, with the interest thereon, and all sums which may hereafter be advanced by the said party of the second part to the said parties of the first part, or any or either of them, or at the request of any or either of them; also all taxes, liens, or other incumbrances, costs of lawsuits and counsel fees and other expenses of litigation spent in and about the protection of the title of said property, it being understood that all advances made by the said party of the second part to the said parties of the first part, or any or either of them, shall bear interest from the date of the advance at the rate of one and one-quarter per cent. per month.

Fifth. To retain as commissions, &c.

"Sixth. After all of the above payments, expenditures, and advances, with interest as above provided, shall be paid, then said Le Roy shall reconvey to the grantors above named, in proportion to their respective interests as claimed to be held by them immediately prior to the execution hereof, and shall account to them or pay over to them all surplus moneys received from sales, and transfer to them all securities for deferred payments.

"Seventh. This trust may be terminated as to all unsold portions of said property, and said parties of the first part shall be entitled to a reconveyance on payment of all the sums of money hereinbefore provided to be paid; and said parties of the first part may make payment of the whole or any part of said indebtedness at any time.

Eighth. Relates to commissions on sales.

"Ninth. The trust hereby created is a continuing and subsisting trust until the whole of the indebtedness hereinabove specified is paid, and it shall not be necessary for the said party of the second part to bring any suit on said indebtedness to stop the statute of limitations from running."

Several other clauses are contained, not of importance in determining this controversy, except so far as they show that various *further agreements and understandings* were provided for in the deed. (See Record, pp. 2, 3, 4, and 5.)

The bill further avers that said amounts due to said Patterson, and Wilson and Crittenden, and Felton, amounting to $49,000, were included in said sum of $446,849; that said Le Roy accepted said deed and thereby became and was a trustee for said parties, and took possession of all the real estate in the deed mentioned and still holds the same; that said Le Roy received all the personal property mentioned in said deed and has realized large sums therefrom, and has realized large sums of money from the use and sale of said real estate.

The bill further avers that on the 26th of September, 1874, said Le Roy commenced an action in the third judicial district of California against the grantors in said trust deed to foreclose said lien on real estate then unsold and to have

said property sold to pay what was due; that all said grantors appeared and answered, and that such proceedings were had therein that on January 10th, 1879, it was adjudged that there was due to said Le Roy under said deed of trust $768,077, and that all said property should be sold to pay said amount found to be due.

The bill further avers that the amounts due to said Patterson, and Wilson and Crittenden were included in said judgment; that under said judgment a sale took place (Record, p. 6), and that said Le Roy purchased the property described in the bill in this cause, and that said property is now owned and held by said Le Roy in his own name.

The bill further avers that the plaintiff is the owner and holder under and by virtue of assignments, &c., of said claims of Patterson, and Wilson and Crittenden, and "that he demanded of said Le Roy a full account and settlement of his trust and the conveyance to him of his proper proportion of the real estate standing in his name, but that said Le Roy refuses to convey any property to him or pay him any money, or to recognize his right or the right that he represents in any way." (Record, p. 7.)

Plaintiff prays that said Le Roy "may be compelled to account for all sums received under said trust and that he be decreed to hold all land purchased by him, in trust for the plaintiff, and that he be decreed to convey to plaintiff his just proportion thereof, and for such other and further relief as may be necessary." (Record, p. 7.)

THE ANSWER.

The answer of defendant Le Roy admits the execution of the deed of trust as alleged, but, as he has no knowledge or information of the indebtedness to Patterson, and Wilson and Critenden, and John B. Felton, "he denies the same," and denies that "any amount due to said Patterson, Wilson and

Crittenden, and Felton, or either of them, was included in said sum of $446,849." (P. 13.)

He admits acceptance of the trust, "but denies that he thereby became or was a trustee for said W. H. Patterson in the sum of $13,000, or for said S. M. Wilson and A. P. Crittenden in the sum of $13,000," or for said J. B. Felton in the sum of "$23,000, or either of them in any sum."

"The defendant admits that all of the personal property in said deed mentioned has been received, and that he has realized large sums therefrom, and that he has realized large sums of money from the use and sale of said real estate and from the sale of personal property, for which he has fully accounted, and all of which is known to the plaintiff's assignors, and said accounts were filed, stated, adjudicated, and determined in said suit mentioned in the bill of complaint.

"Defendant admits that he commenced the suit therein mentioned as alleged and appearance and issues joined and trial and judgment as therein alleged; but he denies that the amount due to said Patterson and included in said judgment was thirty-two thousand dollars or any other sum, and he denies that the amount due to said Wilson and Crittenden and included in said judgment was thirty-two thousand dollars or any other sum.

"He admits that a sale took place under said judgment, and that at said sale this defendant became the purchaser not of the properties alleged in the bill of complaint, but of so much thereof as had not been before that time sold by him to other parties, and that the purchase price was credited on said judgment, and that the said property so purchased is now owned and held by defendant in his own name.

"Defendant, further answering, saith that he has no knowledge nor information sufficient to found a belief whether the said William H. Patterson assigned all or any of his right, title, or interest in or to said claim or to the said deed of trust to the plaintiff, nor whether all of the right, title, or interest of the said Wilson and Crittenden has by divers and sundry conveyances been assigned or transferred to the plaintiff, or whether plaintiff now owns all or any part of the interest they have or ever had, if any, and therefore he

denies the same and leaves the plaintiff to make such proof thereof as he may be advised.

"Defendant, further answering, admits that the plaintiff demanded of this defendant a full account and settlement of his trust and a conveyance to him of his proper proportion of the real estate standing in his name, and that he refuses to convey any property to the plaintiff or to pay any money to him, or to recognize his right or the right that he represents to any such conveyance or payment, and he denies that the plaintiff is entitled to any part of the said property or money or has any interest therein."

Explaining further, the defendant says, in his answer (p. 15, bottom):

"This defendant had no negotiation, contract, or agreement with any one but the said Felton, and the trust deed was prepared and presented by him. When the trust deed was drawn the said sum of forty-nine thousand dollars was included in the sum secured by said trust deed, which was to be paid only after this defendant should be reimbursed the whole amount due and to become due him for the principal then due at the date of the trust deed, with the interest thereon and all subsequent advances and expenses with the interest thereon, and the said forty-nine thousand dollars was not agreed by any one to be paid in any other way or in any other event."

The defendant sets out in his answer a correspondence which he had with John B. Felton September 27th, 1871, as follows (pp. 16–17):

"SAN FRANCISCO, 27*th Sept.*, 1871.

"To Messrs. J. B. Felton, S. M. Wilson, and W. H. Patterson.

"GENTLEMEN: I hereby certify that you are entitled to the following sums payable out of a certain deed of trust made to me the first day of October, A. D. 1870, by Juana M. Estudillo, José Ramon Estudillo, José Antonio Estudillo, José Vicente Estudillo, Luis D. Estudillo, Jesus Maria Estudillo, Magdalena E. Nugent, and John Nugent—that is to say:

"J. B. Felton, Esq., to the sum of twenty-five thousand dollars; S. M. Wilson, Esq., to the sum of twelve thousand

dollars; W. H. Patterson, Esq., to the sum of twelve thousand dollars.

"These sums are to be paid, principal and interest, from the date of said deed as soon as I shall be entirely reimbursed, principal, interest, advances, and expenses.

"Respectfully, yours, &c.,

"LE ROY, TH.
"JOHN B. FELTON.

"Sept. 27th, 1871."

The defendant alleges that he has fully accounted for all the property embraced in the trust, but admits that he has paid nothing on account of the said claims held by the plaintiff. He claims that he did not realize enough from rents, sales, &c., to pay all the other sums due him for advances, and "denies that there ever was any other trust than that hereinbefore set forth, and he avers that he never has been paid the amount due to him for principal, interest, advances, and expenses. On the contrary, he saith that after crediting all the proceeds of sales of said property and all moneys received from the trust estate, and crediting all sureties and property taken by this defendant to his own account, and charging against himself as money received and all other proper credits, there was a deficiency after the closing sale, which was on the first of May, 1880, due to this defendant on his own account, and irrespective of and aside from the said forty-nine thousand dollars and the interest thereon, of thirty-five thousand six hundred and seventeen $\frac{28}{100}$ dollars, no part of which has been paid, and which still remains wholly due and unpaid."

"And this defendant denies that he has in his hands or under his control or has received any money in trust for the plaintiff or his assignors, and he denies that he holds any property, real or personal, in trust for said plaintiff, or in respect to which he ought in equity to be charged with any trust.

The QUESTIONS WHICH ARISE in these pleadings are the following:

1. Did Le Roy become a trustee under the recited deed of trust for the assignors of the plaintiff?

2. In law and in fact was there such a modification of the trust or condition thereof as Le Roy alleges in his answer, viz., that the indebtedness assigned to the plaintiff is postponed to all the other debts and advances provided for in the deed.

3. Was defendant Le Roy released from his relation of trustee by the proceedings and judgment in the State court, wherein the real estate of the trust, not before that time disposed of by him, was sold, and he became the purchaser thereof?

By that sale, and not otherwise, he claims to have closed his account as trustee.

4. Did not a resulting trust arise by operation of law in favor of the plaintiffs' assignors, when Le Roy obtained a judgment in his own favor, based upon our claims, and purchased property at sales under that judgment.

The case is slightly involved by the fact that Le Roy was both trustee and *cestui que trust* under the said deed.

The claim of the plaintiff is that the debts he holds are protected by the deed on the same basis as are all the advances of Le Roy; that the latter must be held to be a *co-cestui que trust* with the plaintiff. He further claims that, independently of the deed, a resulting trust in his favor arises out of the judgment obtained by Le Roy and the purchases of property made under the same, in all the property so purchased.

ASSIGNMENT OF ERRORS.

The plaintiff, therefore, assigns the following errors:

The court below erred in dismissing the bill—

1. Because the pleadings and evidence show that Le Roy,

on the execution and acceptance of the trust deed, became a trustee for the debts now held by the plaintiff.

2. Because they show that Le Roy, deceased, has not been discharged from said trust, and has not accounted under said trust so as to bar the right of the plaintiff to an account in this action.

3. Because they show that defendant Le Roy was in law charged with a trust in favor of the plaintiff as to all real estate bought by him at the foreclosure sale.

Argument on the Facts.

There can be no question but that the fees of the lawyers were a *bona fide* debt of the Estudillos. The deed made to Le Roy was intended by the grantors therein to secure those fees and included them in its language.

The claim of Patterson was assigned January 30, 1880, to McLaughlin, and on the 7th of April following by McLaughlin to Kirkpatrick and by him to plaintiff. (Plaintiff's Exhibit A, p. 108.) These assignments were proven by Kirkpatrick. (Record, p. 32).

The claim of Crittenden & Wilson was assigned by S. M. Wilson, surviving partner, to Clara C. Crittenden, widow. In May, 1880, she assigned to plaintiff. (Testimony of Parker Crittenden, p. 41; Plaintiff's Exhibits B and C, Record, p. 109.)

The indebtedness is proven by the testimony of Wm. H. Patterson, pp. 24, 25. It is assumed to exist by the Letters of Le Roy to James L. Crittenden (Respondents' Exhibit No. 25, Record, p. 191), illustrated by the letters of the series. (Exhibits of defendant, Nos. 22, 23, 24, 26, 27, 28, and 29, pp. 190 to 193 of Record.)

It appears from the evidence given by James L. Crittenden (Record, pp. 85, 86) that in 1875 or 1876 he called on Le Roy about the claim of Clara C. Crittenden. His object

in doing so was to collect the claim or to know why it was not paid. Le Roy produced the deed of trust and exhibited it to him. Le Roy said the matter was all in that deed. Crittenden asked if there were any other papers, and was shown some statements of accounts.

Q. 14 (Record, p. 86). "Did he show you this paper" (Respondents' Exhibit No. 14)?

A. "I never saw this paper before."

This witness urged Mrs. Crittenden's claim on Le Roy before the judgment in the foreclosure suit, and in letters of November 19 and 28, 1879, after the judgment and prior to the purchases by Le Roy, in May, 1880, under the judgment in that suit. (Respondents' Exhibits 26 and 27, Record, pp. 182, 193.)

J. L. Crittenden attempted to intervene in the foreclosure suit in her interest, but was opposed by Le Roy's counsel, and it was denied by the court. (Record, p. 92.)

As to Patterson's interest, the respondents' witness, Steinbach, who was also his clerk and adviser, says it was "several times alluded to in conversations I had with Patterson," and on one occasion Patterson said if Le Roy would turn over a certain piece of land (of the trust property) "we will take it in payment of our counsel fees." (P. 66 of Record.)

Prior to the foreclosure case Le Roy often conferred with John B. Felton, his attorney, and W. H. Patterson, the attorney for the Estudillos.

There is little disclosed in the testimony as having transpired about Felton's interest in the $49,000, but that little is very emphatic. Felton died in May, 1877 (Record, p. 93), whilst the foreclosure suit was pending. At the time of his death Le Roy had an account against him of over $36,000, which he presented to his executor (Record, p. 97), but did not insist upon. This sum appears to have been outside of the $23,000 or $25,000 secured to Felton in the trust deed, so that Le Roy, if he kept the latter sum, would still have

an equitable balance of account against Felton. In fact, Le Roy had many money transactions with Felton, and the latter borrowed money and was charged on Le Roy's books with the moneys advanced. (Steinbach's testimony, Record, p. 72.) But Le Roy never paid Felton any money on this trust account (Record p. 58, quest. 9). The inference therefore is that Felton was always, in other matters, a debtor to Le Roy, whilst in this he was in the position of a creditor. He was also Le Roy's legal adviser and counsel in the management of the trust.

It is not to be wondered at, therefore, that it is not shown that Felton was urging his claim on Le Roy in the same way the other two claims were urged.

That the entire $49,000 was constantly recognized by Le Roy not only appears from his answer, in a general way, but more explicitly from his testimony and exhibits. At p. 45 of record he says the amount of $446,849, named as the consideration of the deed of trust, was in part made up of "the sum of $49,000, which was understood to be for lawyers' fees." At p. 49, in reply to question 46, Le Roy verified his Exhibit No. 4, pp. 45, 46, where it appears as "Debt of Estudillo family to Felton, Wilson, and Patterson, &c., $49,000."

In his foreclosure suit against the Estudillos Le Roy alleges that they were indebted to him in the original sum of $446,000 (p. 194), and (par. XII, p. 196) that he is the lawful owner and holder of "said mortgage and of all the indebtedness secured thereby."

Accordingly this $49,000, with interest, was added into the judgment in the foreclosure suit. (See final account of referee, first item, Record, 209 (583); also the statement on p. 210 (584.) In both of these the entire sum is stated at $446,849 (or $446,699.14, the corrected aggregate after deducting error of $149.86 in the sum due and paid to the Hibernia Bank). Le Roy seeks in the present suit to deduct the $49,000 and interest thereon, $60,821.25, total, $109,821.25,

from his judgment in the foreclosure suit in his statement to show that he is not in funds to pay our present demand. (Exhibit No. 21, p. 189 (550); see also amount of the judgment, Record, pp. 214, 215.) The following is quoted from the decision of the court overruling the motion for a new trial in that case, Record, p. 228:

"The deed was executed to secure payment of the entire sum, and every item composing the sum of the indebtedness. Counsel in his brief admits that the defendants intended and did convey to the plaintiff title to the trust property, to pay an indebtedness of $446,849. Now, although the particular item in controversy, or any others, may not have been actually paid, yet the trustee is bound by the deed of trust to pay it according to the terms of the deed under which he holds the property."

There can be no denial, therefore, now in the present case of the fact that Le Roy became and was a trustee under the deed of October 1, 1870, for the $49,000, attorneys' fees, and hence for the amounts secured for Patterson and for Wilson & Crittenden, which are the basis of this action.

THE DEFENSE.

The defense to this action embraces two propositions, both of which must be made good before the defendant is entitled to a decree of dismissal.

1st. Though the defendant admits that the consideration of the deed of trust included the $49,000, he says this "was to be paid only after this defendant should be reimbursed the whole amount due and to become due him for principal then due at the date of the trust deed with interest, and all subsequent advances and expenses with interest," &c. Such is his answer. Such is the "understanding" sought to be established about a year after the date of the trust deed. (Respondents' Ex. No. 14, p. 121.) That paper is dated the 27th September, 1871, and its subject-matter is stated in the

present tense, and if at that date it establishes such "understanding" as against Felton, it had no virtue as against Wilson and Patterson, for, though addressed to them, it was never delivered to them or served on them, and they were never asked to sign it. Patterson says (Record, pp. 25, 26) he never heard of it until within a few months before he testified, which was in July, 1880, and, so far as the record discloses anything, it indicates that Crittenden died before the paper of 27th September, 1871, was issued, and that the attorney representing the Wilson and Crittenden claim saw the paper dated September 27th, 1871, for the first time when he was on the witness stand. Both Patterson and Clara Crittenden were alive as to their rights and demanding money, and a long time ignorant that Le Roy alleged any such understanding.

If any such understanding existed at the date of the deed it should have found expression therein. It was therein stipulated that the trustee should not charge his commissions from time to time as sales were made, but they should not be deducted till all the debts to the *cestui que trusts* were paid. (Record, p. 5.)

It was also therein stipulated that the grantors assented to certain releases; that Juana Estudillo might redeem her residence by paying $8,000; that L. L. Robinson might be paid a sum to be awarded him as receiver, and that Le Roy will not sell the family residence until after the other property has been sold. (P. 5.)

If there was an understanding that of the debts secured by the deed $49,000 was to be postponed to any other claim, not only as a legal proposition ought this understanding to have appeared in the deed, but, as a question of probability in the realm of fact, it may be said to be certain that it would have been expressed in the deed if it had existed. But the deed in terms says that the $446,849 advanced by the party of the second part is to be paid "*on the agreements, undertakings, and conditions hereinafter set forth.*"

Steinbach says, on cross-examination (Record, pp. 102, 103, questions 15 to 26), that he had frequent conversations with Jas. L. Crittenden, attorney for Clara C., about December, 1876; that he had then advised Le Roy to have no conversation with said attorney, and that he (witness) also talked with Felton and informed him that Crittenden contemplated bringing suit, &c. It appears from the evidence of the same witness that at some time (apparently earlier than December, 1876) he had conversed with Crittenden, and that Crittenden had been at Le Roy's office, but "Le Roy was very careful to avoid having any conversation with him—in fact, it was understood between Mr. Le Roy and me that he should be very careful, when Mr. Crittenden should call upon him, in speaking with him," &c. (p. 99, question —), as he (Le Roy) did not understand English well enough.

Mr. Crittenden testifies that he had "a number of conversations with Le Roy without difficulty in understanding him or in his understanding me." (Record, p. 90.)

When Crittenden called at Le Roy's office "to ascertain for himself what all the conditions of the trust deed were" (p. 100, question 30), Steinbach did not show him the Felton paper of 27th September, 1871. (Record, p. 101, question 34.)

Steinbach was at the bottom of the enterprise of getting up the letter of 27th September, 1871, as explained by him (Record, p. 64, questions 13, 14, 15), and he put a padlock on Le Roy's lips when Crittenden called to talk on the subject, in 1876 to 1879. We could ask for no better indication of weakness in the defense set up.

Such a precaution evidently would have been utterly foolish if the truth was at first, as is now claimed, viz., that there was an understanding that the lawyers' fees should be postponed to all other claims. As lawyers' fees are usually in the nature of salvage, when property has been recovered, and experienced lawyers like Felton and Patterson may readily be credited with knowing how to secure their fees

without unprofessional modesty, it would require very direct and positive proof to show that these lawyers had consented when the deed was executed to have their fees postponed to all the costs, expenses, and advances not only that Le Roy had then made and agreed to make, but all that thereafter he might be induced to make—in other words, to stand as insurers of unnecessary delay and extravagance in administering the trust, while Le Roy was charging up the fifteen per centum per annum on all the debts and advances whenever made.

It is enough to say that the proof submitted in the case seems inadequate to overcome the native improbability of the truth of the allegation that there was such an understanding.

The matter of bringing the $49,000 into the deed was talked over between Le Roy and Felton before the former consented to embark in the transaction. (Le Roy's testimony, Record, p. 49, questions 36 to 45, and Steinbach's, Record, p. 62.)

Both Le Roy and Steinbach knew, at the time of the deed, that the lawyers were interested and the aggregate of their fees was $49,000. We cannot help repeating that the astute and careful Le Roy and the wily Steinbach would have had the alleged understanding on the face of the deed had it then existed.

Felton, it is claimed, induced Le Roy to embark in the transaction, and he appears to have had a well-grounded expectation of a resulting advantage both to Le Roy and to himself. That he (F.) had such interest was plain to Le Roy. That he (F.) was arranging in the deed to defer indefinitely the collection of any part of his own demand, and to superadd an enlarged liability to lose the whole, is what Le Roy could not then have surmised, whatever F. may have said as to the sufficiency of the property to pay all the debts.

The fact that the lawyers' fees were to be covered by the deed of trust was well understood before and at the time of

execution. Steinbach had heard it talked over, and the exact sum of $49,000 was "settled within the last few days before the execution of the deed." (Record, p. 73, questions 43 to 48.) *But he never heard it stated by Felton in the discussions he listened to that the lawyers were to be paid last.* (Record, p. 74, question 56.)

Both Le Roy and Steinbach knew that others as well as Felton were interested in the $49,000, but Steinbach did not know their names until in September, 1871. (Record, p. 74, questions 57 to 63.) If there was an understanding, as alleged, in October, 1870, by and between whom was such understanding had?

Both Steinbach and Le Roy say there was such understanding, but they do not testify when or between whom it was agreed to. We are left to infer that they originated the understanding themselves, and kept it alive between themselves, as other witnesses deny ever having heard of it until shortly before this suit.

Le Roy on one occasion spoke to Felton, likewise to Patterson, about certain proposed expenditures (Record, p. 53, question 15), and told them that if expenditures went on like that they could not possibly get their $49,000.

"Mr. Patterson told me I need not be afraid; * * * the value of the property was greater than I had any idea of; there was no danger that we should not be paid."

This seems to have been about June 13, 1872 (Respondents' Exhibit 9, Record, p. 119), and the fears of Le Roy were not then quieted by any reminder that the attorneys stood in the position of guarantors of all that might be spent, but that the trust property was of sufficient value to pay out every claim and was far more valuable than Le Roy supposed.

That there was no "understanding" when the deed was executed that the lawyers stood as guarantors of the other claims must be inferred from the conceded fact that there

was no demand for any such security as that. The property from the first was accepted by Le Roy as good for every amount asserted against it. He afterwards feared to enlarge the amount by other advances, but was quieted by assurance that the property would still be ample; and that it always was from October, 1870, to the commencement of this suit sufficient to answer all the just demands in full may be readily seen by inspection of this record.

If we refer to the account stated by Mr. Mhoon (Record p. 210) we find that the original trust debts, $446,849 (corrected by $149.86, error), $446,699.14, by adding interest at 15 per centum to 15th April, 1878 ($505,142.12), with subsequent disbursements and interest at same rate, amounted to $1,184,954.83, p. 211, on which by sales, &c., $482,331.17 had then been realized, leaving due September 15, 1878, $702,623.66. January 10th, 1879, the judgment of the court (p. 215) was rendered for $766,577 and costs, $1,500.

When we notice that the property then to be sold was *sold for cash;* that it consisted of very numerous tracts of real property described on eleven pages of the record, pages 216 to 226, inclusive; that the plaintiff in that action was allowed to be the purchaser, it is very plain that the reasonable value of all the property at any and every date between October 1st, 1870, and May, 1880, was greater than all the indebtedness.

By the Respondents' Exhibit No. 20 (Record, p. 189) it is shown that he received from the sales made to himself by the commissioners in April and May, 1880—

From Benjamin H. Brooks, commissioner	$157,242 42
From Robert L. McKee, commissioner	474,774 93
Received directly by plaintiff	36,797 23
Add receipts prior to the commencement of the foreclosure suit	482,332 17
	$1,151,145 75

This amount was received for and on account of the ex-

penses of managing the property and the principal and interest of all the indebtedness.

This record and testimony presents to us Mr. Le Roy as a money-lender, and Felton as his friend, ready and competent to show him safe investments at an enormous rate of interest. It shows that Le Roy well knew his ground when entering upon this trust. He well knew the enormous profit to be secured, and well understood the small risk of a margin on the wrong side of the account and that the high rate of interest overpaid for that. The bank judgment was drawing interest at seven per cent. When transferred into a loan of money by Le Roy the rate of interest was more than doubled. The opportunity to lend so large a sum at so high a rate on so good a security was a very unusually brilliant opportunity for Le Roy to invest. In fact, whatever fortune he had, he was to make, as he has made, another off this single investment, even if he should pay "the lawyers" their claims as the first step of proceeding under the deed; and it was his duty as trustee to have done so.

But it must be conceded the cautious Le Roy and the overcautious Steinbach did, about a year after the deed of trust was executed, become desirous of placing the attorneys in the position of insurers of the immense profits of this transaction.

Steinbach became the agent of Le Roy in September or October, 1871. In September, 1871, he carried the letter of 27th September, 1871, set out in the answer of Le Roy, signed by Le Roy, and addressed to J. B. Felton, S. M. Wilson, and W. H. Patterson, to John B. Felton. The introduction of this letter as evidence and the original rough draft of it were objected to. (P. 64. Exhibit No. 14, p. 121.) This letter was never delivered to W. H. Patterson or to S. M. Wilson. No evidence is produced to show that they knew of it or its contents, or that Mrs. Crittenden had notice of any such defense against her claim until after Mr. Felton's

death. Patterson first learned of it a few months prior to this suit. (See Patterson's testimony, pp. 25, 26, questions 17 and 20.)

The plaintiff objects to that paper. He claims that it cannot be used or given in evidence to change the meaning of the trust deed, to add, after its execution, conditions not expressed in the deed, and, in fact, inconsistent with and in contradiction of the tenor of said deed.

It will be seen on scrutiny of the paper that it is not a declaration of an understanding that was had at the date of the deed. Mr. Felton did not stultify himself by admitting that so important a matter was *then* understood though not expressed in the deed. He merely declared his assent to a new proposition dated September 27th, 1871, but he did not undertake to commit any one but himself. Steinbach says Felton drew up the paper, at his solicitation, for Le Roy to sign, and on careful inspection we find that that paper is a new declaration dated September 27, 1871.

It is clear that the paper has done no harm to any creditor or *cestui que trust* who did not sign it, and that it is not evidence of any understanding agreed upon before its date. The defense has paraded that paper for a value that does not belong to it.

Both Steinbach and Le Roy were schooled to the notion that it was their main reliance in this case, and Le Roy uncautiously said in reply (to q. 11, Record p. 58) that he had "no understanding whatever" with Felton about his (F.'s) interest in the trust, "excepting what was in that letter which he made me to write him," a form of statement which is hostile to his defense, though it may not have been so intended.

In this case the testimony does not describe any specific agreement in writing outside of the deed relating to the "lawyers' fees" and embracing all the persons interested, but sets up a verbal "understanding"—alleged to have been had

between Felton, one of the attorneys, and Le Roy. If such had been shown, we should be in doubt whether Felton was talking as attorney for the grantors, the Estudillos, or attorney for the grantee, Le Roy, or for himself as a creditor. (See testimony of Le Roy, Record, p. 60):

"Q. 40. At the time this deed of trust was entered into did "you not have other counsel besides Mr. Felton? A. No; I "had no other counsel.

"Q. 45. I ask you if there was any writing given at the "time showing that the lawyers were to be paid after you "were paid? A. I believe not," &c. (Record, p. 48, Q. 31.)

Le Roy said that in the negotiations which led to making the deed he conferred with John B. Felton alone—had no conversation with Wilson or Crittenden or Patterson. (Record, p. 49, quest. 38. Le Roy said that in these negotiations "Mr. Felton was acting for the Estudillo family," and to question 42 he said Felton was at the same time his (Le Roy's) "counsel and adviser." Felton was also his "particular friend." (Q. 40.)

As to the action against the Estudillos in the State court, none of "the lawyers" were parties to that, nor was Mrs. Crittenden then the owner of the Wilson & Crittenden claim. The judgment taken in that case it appears to be conceded by Le Roy's exhibit in this case, (Exhibit No. 21 Record, p. 189) included "the lawyers' fees."

It is stated in the testimony of Steinbach that Le Roy, in April and May, 1880, under the judgment in that case, became the purchaser of all the trust property that had not before that time been disposed of and accounted for by him. (P. 41, questions 10, 11, and 12.)

The reports of sales made by commissioners in the foreclosure suit were put in evidence (Record, pp. 42–127), *but they are not found in the transcript here.* (P. 42.)

However, Le Roy in his answer admits (p. 14) that a sale took place under the judgment in that case, "*and that at said*

sale this defendant became the purchaser" of so much of the trust property "*as had not been before that time sold by him to other parties.*"

Steinbach says (Record, p. 80, questions 7 and 8) that "Le Roy was the purchaser of all the property sold by the commissioners," and that he owns the greatest part of it now, March 2, 1881.

By this judgment and the sale of the property under it Le Roy claims in his answer to have closed up his trust.

The questions here raised are questions of law. Does his official relation as trustee survive the sale? Does his relation as *cestui que trust* charge him with a purchase for the other *cestui que trusts* in like position with himself? Is he not by operation of law charged with a trust *in invitum?*

The Law of the Case.

Under the statutes of California trusts in relation to real estate arise under instruments of writing and by operation of law. (Code, title 4, sec. 852.)

"A trustee must fulfill the purpose of the trust as declared at its creation, and must follow all the directions of the trustor given at the time except as modified by the consent *of all parties* interested." (Title 8, sec. 2258.)

He can be discharged by a court only in a direct proceeding for that purpose. (Sec. 2282.)

Express trusts may be created "to sell real property, and apply or dispose of the funds in accordance with the instrument creating the trust." (Sec. 857.)

Such being the statute law the familiar principle will apply, that "courts never permit parol proof to contradict an intention expressed on the face of the instrument."

Perry on Trusts, vol. 1, par. 76.

The evidence in the case does not show a written agreement contemporaneous with the deed and explanatory of

its meaning. Such contemporaneous agreement would require the "consent of all the parties in interest" in the State of California. An attempt has been made to show a parol "understanding."

In a late case, "Bast *vs.* Bank" (101 U. S. Reps., 93), the United States Supreme Court held "that, in the absence of accident, mistake, or fraud, evidence was not admissible to show a parol agreement, made contemporaneously with the assignment and as part of the transaction, to issue execution and collect a judgment whenever the money could be made thereon."

The Court remarked (page 96) that "no principle of evidence is better settled at common law than that where persons put their contracts in writing it is, in the absence of accident, mistake, and fraud, conclusively presumed that the whole engagement and the extent and manner of their undertaking was reduced to writing."

The Court mentions approvingly the remark of the State supreme court of Pennsylvania in Martin *vs.* Berens (67 Pa. State Reps., 463) that, where "parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative."

In this case Le Roy is holder of the legal title to fulfill trusts created by deed of the Estudillos. He is also one of the "*cestui que trusts.*" Equity will not allow him to set up, chiefly by his own declarations, a parol understanding inconsistent with the deed for the purpose of increasing his own share in the property, to the detriment of his *co-cestui que trust.*

It has been conceded by the defendant in this case that the $49,000 was part of the consideration of the trust deed. In California—

"Where a part of the purchase-money of land is paid by a person other than the grantee, a trust results in favor of

the latter for an interest in the land proportioned to his share of the purchase-money."

Hidden *vs.* Jordan, 21 Cala. Rep., p. 92.
Case *vs.* Codding, 38 Cala. Rep., p. 191.
Bayles *vs.* Baxter, 22 Cala. Rep., p. 575.
Millard *vs.* Hathaway, 27 Cala. Rep., p. 119.
Curry *vs.* Allen, 34 Cala. Rep., p. 254.

In Kreutz *vs.* Livingston *et al.*, 15 Cala. Rep., 344, defendants were holders of a mortgage to secure advances made by themselves and others. Plaintiff had made advances and was one of the persons intended to be secured, though not a party to the mortgage. Defendants assigned the mortgage and received the consideration, but refused to pay any money to the plaintiff. Held that they were liable.

"A resulting trust ensues when a person acting in a fiduciary relation uses the trust funds to purchase property and takes the title in his own name."

1 Perry on Trusts, par. 127.

" If a person acting in a fiduciary character purchase property with the fiduciary funds in his hands, and take the title in his own name, a trust in the property will result to the *cestui que trust* or other person entitled to the beneficial interest in the fund with which the property was paid for."

Idem.

" Whatever acts are done by trustees in regard to the trust property shall be deemed to be done for the benefit of the *cestui que trust* and not for the benefit of the trustee."

2d Story's Eq., par. 1211.

" If a trustee or executor compound debts or mortgages, or buy in for less than is due, he shall not take the benefit of it to himself, for when he takes a trust he is to take it for the benefit of the *cestui que trust.* He cannot be permitted to raise in himself an interest opposite to that of the party for whom he acts. This is a fundamental doctrine in equity."

Van Horn *vs.* Fonda, 5 Johnson's Ch. R., 408.

The judgment obtained by Le Roy January 10, 1879, in the State court embraced the claims of "the lawyers" as well as the advances of Le Roy. When he bid in the property thereunder he did so for the benefit of the *cestuis que trust;* he did it in protection of the interest of "the lawyers" equally with his own interest, and such property is now held by him in trust. That he took deeds in his own name does not affect our rights. He cannot secure the property to himself absolutely in that manner.

Jenkins *vs.* Frink, 30 Cala., 586.
Burhans *vs.* Van Zandt *et al.*, 7th N. Y. Reps., 523.
Rothwell *vs.* Dewees, 2d Black. Sup. Ct. Rep., p. 613.
Flagg *vs.* Mann, 2d Sumner, 523.

"The mortgagee, who is also a trustee, is as strictly bound to fulfill his trust faithfully as he would be were he not a creditor, but acting for the benefit of another *cestui que trust.*"

"A trustee should never be permitted to defeat the rights of a *cestui que trust* so long as it is in the power of a court of equity to enforce them."

Gunter *vs.* Jones, 9 Cala., 644.

In Jenkins *vs.* Frink (above), one of the several purchasers who bought land under a contract bought an outstanding judgment, under which he obtained a sheriff's deed to himself alone. Held, that he became a trustee *in invitum* and held the legal title for the benefit of all the parties to the contract.

As trustee under the deed Le Roy is charged with the collection of the money due "the lawyers," and as *co-cestui que trust* he is liable to account for the property he purchased in his own name at the sale, and which is described generally in the bill of complaint and more specifically in the order of sale in the foreclosure suit.

Under this second principle he becomes anew a trustee "by operation of law" and is chargeable "*in invitum*" with a trust in our favor. There is no place in the order of sale

or in the matter of the purchase for a defense such as he has set up in this action, that our debt is postponed to his advances.

It is very clear that Le Roy did not fully account to plaintiff's assignors in the foreclosure suit. They were not parties to it. His estate is, therefore, now liable to account to us for our interest in the property he has purchased, and this result follows whether or not our claims have been postponed to Le Roy's. Even if they came in last, the property is to be accounted for by Le Roy, and it is fairly indicated on the surface of this case, though not directly proven, that there would be a large sum realized by the plaintiff from an account on that basis.

But we think it clear that we are entitled to a settlement on an equality with Le Roy, and if there should be a loss he is liable to bear his proportion, and when the judgment below is reversed, that this basis of settlement should result from the decision of this court.

HENRY BEARD,
CHAS. H. ARMES,
Attorneys for Appellant.

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HENRY BEARD,
CHAS. H. ARMES,
Attorneys for Appellant.

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IN THE

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OCTOBER TERM, 1886.

No. 24.

G. D. NEWHALL, APPELLANT,

versus

E. G. LE BRETON, ADMINISTRATOR OF THEO. LE ROY ET AL.

REPLY TO BRIEF OF ATTORNEYS FOR APPELLEES.

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The appellant takes issue with the appellee as to the legal effect of the original deed of trust.

CONTENTION OF APPELLEES.

The counsel of the appellees state their case thus (brief, p. 4):

"Mr. Felton prepared this deed of trust to Le Roy, which was executed by the Estudillos as security for his loan of $379,849, and he added to the amount so secured the sum of $49,000, which was the fee coming to himself and his associates, and making a total of $446,849 expressed in the deed. This $49,000 *was tacked on to the indebtedness* of $379,849 incurred by the Estudillos to Le Roy, as aforesaid, *upon the express understanding that it was to be paid only after Mr. Le Roy had been fully reimbursed his indebtedness, with interest and expenses about the property.* By this deed the Estudillos

became the trustors, and Le Roy the trustee and *cestui que trust* as to the amount due him. There was also a special trust in favor of Felton and his associates to the extent of $49,000 and interest thereon from the date of the deed, in case *sufficient was realized from the property to meet this after paying Le Roy in full.*"

CONTENTION OF APPELLANT.

We claim that the deed itself (Record, pp. 2 to 5) is the arbiter of its own contents and meaning; that it does not mention any such sum as $379,849 as due Le Roy, but the sum of $446,849. The sum of $49,000 is no more tacked on to $379,849 to make the $446,849 than $379,849 is tacked on to $49,000. Neither does the deed mention any special trust for the lawyers, or that their debt is in any regard less secured than any other sum or moneys intended by the deed to be secured.

Unnamed amounts of future advances are secured with, and equally with, a named sum—$446,849—all mentioned as due Le Roy, and though the particular sums had not been all paid and advanced at the date of the deed, they are by the deed treated upon an equality, and the trustee assumed to pay them according to the terms of the deed.

And it is to be noted that under item fourth of the deed (Record, p. 4) he was to treat all the sums that constituted the $446,849 alike, just as he was to be secured on a like basis for future advances.

That is certain which can be rendered certain, and the then existing debts and the future advances with interest, reached, at any given day a given sum, easily divided, so as to bear like relation to any greater or less aggregate to be distributed in like proportion. There is no difficulty, therefore, in ascertaining our share of the money or property embraced in the trust.

It was only after ALL PAYMENTS provided for were made by the trustee that the residuum, if any, was to be transferred to the Estudillos, the trustors.

The counsel for appellees say that $49,000 was added to the trust "upon the express condition" that the payment of that much was to be postponed to the payment of all other amounts secured. (Brief, p. 7.)

Well, we do not find the condition expressed in the writing, and it is the deed which has declared the trust. It was this deed that the assignors of our client ratified, and there is not an iota of evidence in this record to show that they ever agreed to any such condition as is alleged, or ever heard any conversation about it, until over seven years after the deed was recorded. Then they repudiated any such condition. No conversation was had with them in 1870. (Record, p. 48, Ques. 32.)

Apologizing to the court for not having quoted and explained the statutes of the State more fully in our original brief, we now quote the following:

"No estate or interest in lands other than leases for a term not exceeding one year, *nor any trust* or power over or concerning lands, or in any matter relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, *or declaring the same*, or by his lawful agent thereunto authorized by writing."

1 Hittel Gen. Laws, sec. 3150.
Stats. 1850, p. 266, sec. 6.

"The preceding section shall not be construed * * * to prevent any trust from arising or being extinguished by implication or operation of law."

1 Hittel Gen. Laws, sec. 3151.
Stats. 1850, p. 266, sec. 7.

These are the statutory provisions claimed by appellees as controlling this case, enacted in 1850.

We respectfully submit also the following sections from the Civil Code of California, enacted March 21, 1872, to take effect January 1, 1873.

An examination of the Code shows that it was intended to give popular information to the people of the existing law of the State by a combination and condensation of both statute and common law then in force in the State. If new provisions were introduced, special attention was called to them as modifying law then existing. But the following were but the compilation of the law in force on the subject at that time, and in that aspect are on a level of authority nearly equal to a statute. Wherein they prescribe duties to a trustee they become operative to control the conduct of Le Roy as trustee, under the deed of 1870, from January 1, 1873.

"SEC. 2228. In matters connected with his trust a trustee is bound to act in the highest good faith towards his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

"SEC. 2253. The nature, extent, and object of a trust are expressed in the declaration of trust."

"SEC. 2254. All declarations of a trustor to his trustees in relation to the trust, before its acceptance by the trustees, or any of them, are deemed part of the declaration of the trust; except when a declaration of trust is made in writing all previous declarations of the same trustor are merged therein."

"SEC. 2258. A trustee must fulfill the purpose of the trust as declared at its creation, and must follow all the directions of the trustor given at the time, except as modified by the ~~conduct~~ consent of all parties interested, in the same manner and to the same extent as an employee."

"SEC. 1625. The execution of a contract in writing, whether the law requires it to be in writing or not, supersedes all the oral negotiations or stipulations concerning the matter which preceded or accompanied the execution of the instrument."

We rely on the authorities cited on pp. 23 and 24 of our original brief to establish the legal proposition that equity

will not allow a trustee to set up a parol understanding inconsistent with the deed in order to increase his own share in the property, and that this is and was the law in California is shown also by the foregoing quotations from the Code.

We are not willing to have our case decided upon the assumption by opposing counsel, that it is based on doctrines which we have not stated in our brief. We have not claimed that a trust in favor of our clients arose, by *implication or operation* of law, solely from the one circumstance that our money is embraced in the sum mentioned in the deed.

We have claimed the trust in our favor to have been established by the words and intent of the trustors expressed in the deed, and that the testimony of Le Roy and Steinbach to vary the legal effect of these words cannot be received in any court as evidence, and that the trust established in our favor by the deed, clings to all the transactions of Le Roy, and that he has not extinguished our interest by his purchase of a large residuum of the property at a judicial sale, ten years after he entered upon the trusteeship, especially as the judgment was entered in his favor for the money due on our claims.

If the appellees could be heard to say that our claims were to receive no dividend under the deed until all others had been satisfied, the testimony of Le Roy and Steinbach would not satisfactorily establish any such parol understanding, weakened as it is by their concessions and conduct in the matter.

That the lawyers' fees were to be included in and secured by the deed was often talked of and understood between Felton and Le Roy in August and September, 1870, prior to its execution on October 1, 1870; but during all those negotiations Steinbach never heard it said that the deed was to show that the lawyers were to be paid last. (Questions and answers 43 to 56, inclusive; record, pp. 73 and 74.)

Inspection of the deed shows every important condition specified therein, but does not show that the lawyers were to

be paid last. On the contrary, the paragraphs 4th and 6th, specifying the duties of the trustees, require payment of all the "indebtedness hereinbefore specified" without priority or postponement of any portions.

No such condition as is now set up had been agreed upon prior to the deed. Le Roy says he understood the condition alleged was agreed to, but, upon the well-settled principles of law, the deed itself is the only criterion of the conditions of the contract, and no such condition is found therein. This deed Le Roy accepted and he entered on the trust, and the fact that the lawyers were not paid at once does not impair the undertaking of Le Roy to pay them.

It is a fact of very material importance that both before and after the deed, whenever the sufficiency of the security to cover all claims came up for discussion, it was not said that the loss, if any, would fall on "the lawyers," but it was maintained by Patterson, Wilson, and Nugent, as well as by Felton, that the security was at all times ample for *all* the debts, and the new advances proposed.

Le Roy accepted this fact when he accepted the deed and entered upon the trust.

The suppression and concealment by Le Roy and his agent, Steinbach, of their claim that the attorneys were to be paid last impairs the force of their testimony.

Patterson, though often conversing with them about the trust, had not heard of such a condition until shortly—say three months—before he testified (which was July 17, 1880). (Record, p. 25, Q. 17, and p. 26, Q. 20.)

The deed was shown to Patterson and he ratified it by his concurrence, but no statement was made to him that payment of his debt was to be postponed to the payment of other claims. (Record, p. 26, questions 21 to 24.)

It appears from the testimony of Steinbach, Le Roy, and Crittenden that the last-named called repeatedly at Le Roy's office while the foreclosure suit was pending to insist upon having some payment by Le Roy on his mother's claim.

In these repeated interviews he was not advised, until May, 1877, of Le Roy's purpose not to pay any money thereon until he himself was reimbursed for other advances. (Record, p. 191, Ex. No. 25.) Le Roy, under Steinbach's advice, declined to talk (p. 99, Q. 24), and Steinbach added concealment to silence, and though having in his mind the Felton paper of 27th September, 1871, did not show it to Crittenden, but preserved it, so as to produce it in court as a surprise, and, as Steinbach thought, a paper that would defeat Mrs. Crittenden's demand. (Record, p. 100, Q. 34.)

A trustee and his clerk who act in this manner toward a party claiming to be a beneficiary of the trust are not worthy of full credence when testifying in their own interest.

In the litigation before the district court—1874 to 1879—in which J. L. Crittenden, as attorney, was endeavoring to bring forward the claim of his mother, Le Roy proceeded to take his judgment upon the principal and interest of the $446,849 mentioned in the deed and to buy in all the trust estate under that judgment, notwithstanding the objection of the Estudillos that Le Roy had not actually paid the amount of our debts. (Record, pp. 227, 228.)

THE FELTON PAPER.

A practical view of the testimony and the facts and records seems to be this, that prior to the deed some conversation had occurred in which the attorney of the Estudillos had said that the lawyers, including himself, were willing to wait for their pay, but when the deed was drawn such a condition was not inserted.

Afterwards, September 27, 1871, Le Roy tried to have the deed reformed, not by a suit in chancery, but by an agreement or paper in writing, outside the deed.

Now it appears that the Felton paper is not so destructive of Mrs. Crittenden's claim as Steinbach supposed it would be when he concealed it from her attorney in 1876 or 1877. Consider it a moment:

"These sums *are to be paid*, principal and interest, * * as soon as I shall be reimbursed, principal, interest, advances, and expenses.

"THEO. LE ROY."

"This is the true understanding about the above interests.

"JOHN B. FELTON.

"Sept. 27, 1871."

(Record, p. 121. Ex. No. 14.)

What is that paper? It is an understanding had September 27, 1871, and if it can be maintained against Felton's interest is not valid as against Patterson and Crittenden.

Patterson denied the authority of Felton to act as his agent after he had assented to the original deed (p. 26, Q. 21), and Felton did not assume to act for any one but himself.

Neither is the memorandum of Felton "a declaration" which can be given in evidence against others in like interest. He was not a partner with them, and at best the declaration is of a new arrangement to which they were not parties, and which was concealed from them as long as possible.

The paper is of no force whatever as against the appellant in this suit, and his attorney objected to it as evidence. (Record, p. 64, Ques. 13, 14, 15.)

AN ACCOUNTING DEMANDED.

The counsel for the appellees have, we believe, erred in asking this court to accept the judgment of the court below as conclusive, in its practical refusal to order an account to be taken in this case, on the ground that we had alleged no error in the judgment in that respect.

Our second cause of alleged error fully covers this in very comprehensive terms.

SUIT BY THE ASSIGNEE.

The objection of the defendants that this suit was begun

by an assignee comes with no force in view of the circumstances developed.

The claims of the assignees were not fully ripe until Le Roy had refused to pay them anything, and this was not until 1880.

Patterson was then in declining health, and on that account had retired from business. Mrs. Crittenden had been badly treated at every approach to Le Roy at his office for satisfaction.

The claims needed assertion by a vigorous and determined man, and circumstances practically compelled the assignment of them for that purpose if no other.

Le Roy had made a large fortune out of the trust property, and his acquisitions were indirectly due to the legal services "the lawyers" had rendered in saving the property prior to the deed of trust. He is not in a position to justify the repudiation of their compensation.

IN CONCLUSION.

We think we have made it plain—

1st. That Le Roy became a trustee under the deed to pay our debts on an equality with other advances, and that the alleged condition that our claims were to be postponed to others is not legally established.

2nd. That (our first proposition being maintained) Le Roy has never so accounted for his trusteeship as to bar our present demand for an account.

In the foreclosure suit in the district court he sued upon our debts as his own, and took his judgment upon the aggregate. Had he intended, or had his attorneys then believed, that he could obtain all the property to the exclusion of our claims—had they believed that there was any valid condition to the deed by which our debts could be

postponed to his—then was the time to set up such condition to make us parties to the suit and to foreclose if possible our interests as well as those of the Estudillos.

Having obtained his judgment and bought in the property, he claims thereby to have become absolute owner of all that he purchased to the exclusion of our interests, and this claim, we assert, is not good in law.

On pages 23 to 25, inclusive, of our original brief we have quoted authorities to maintain the proposition that the purchase of the property of the trust, under a judicial decree by the trustee, did not extinguish our right to a dividend, as parties secured by the original deed, on a par with money advances made by Le Roy.

We beg to add reference to the recent case decided by the supreme court of California: Cavagnaro *vs.* Jean Don, p. 227, 63d Cal'a Rep'ts.

The case of Wright *vs.* Ross, cited and relied on by appellee, was an early case, and was decided by a divided court, *Judges Rhodes and Sanderson dissenting.* Moreover we do not find that it goes as far as counsel for appellee claim in their brief.

We may be excused for referring to the fact that in a cause, No. 9002, Dep't A, in the superior court at San Francisco, arising out of this trust business, and prosecuted by Katherine B. Felton *vs.* Edward Le Breton *et al.*, the judge (Sullivan) recently expressed the opinion that "the interest of Felton in the trust estate was never foreclosed, and the plaintiff is entitled to an accounting as prayed." He accordingly directed counsel to prepare a decree in favor of the plaintiff.

The case has not yet reached a stage at which a report of it is likely to find its way into the books or into the "West Coast Law Reporter."

We respectfully here refer to a case lately decided by the supreme court of Minnesota, not yet in the books, but printed in the daily newspapers of St. Paul. (See Pioneer Press of October 10, 1886.)

The case, King *vs.* Remington *et al.*, involved very valuable properties, and was exhaustively argued by able counsel.

We subjoin part of the syllabus, which appears to have been written by Chief Justice Gilfillan:

"K. owned a large quantity of real estate, and was largely indebted, beyond his ability to pay at once without sacrificing the real estate. His wife also owned a large amount of real estate. June 15, 1875, the two conveyed the greater part of their real estate to R. by deeds absolute in terms. At the same time K. and R. executed an agreement in writing, acknowledging the conveyance to have been made as security for advances to K. made and to be made by R. and containing provisions in respect to future advances of money and credit which R. covenanted to make, from which the purpose of the transaction appears to have been to enable K., by means of the advances so to be made, to pay off his debts and save so much of his property as might remain after disposing of enough to reimburse R. for all advances made and to be made, and interest and expenses. The contract gave to R. peculiar powers with respect to the holding and disposition of the lands conveyed. Held that this created such a relation of trust and confidence between the parties as disabled R. to purchase under judgments or mortgages or bankruptcy proceedings and hold against K., for his own benefit, property of K., whether included in the deeds executed as security or not."

The court cited the subjoined as authorities upon the question decided.

Baldwin *vs.* Allison, 4 Minn., p. 25.
Jewett *vs.* Miller, 10 N. Y., 402.
Michoud *vs.* Girod, 4 Howard, 503.
Greenland *vs.* King, 5 Land Jurist, 18.
Van Epps *vs.* Van Epps, 9 Land Jurist, 237.

Respectfully submitted,

HENRY BEARD,
C. H. ARMES,
Counsel for Appellant.

119-259

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

No. 24

G. D. NEWHALL, APPELLANT,

vs.

EDWARD G. LE BRETON, ADM'R OF THEO. LE ROY, ET AL., APPELLEES.

Argument of Evans S. Pillsbury, and Pillsbury & Blanding, Attorneys for Appellees.

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Supreme Court of the United States.

No.

G. D. NEWHALL, APPELLANT,

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Argument of Evans S. Pillsbury, and Pillsbury & Blanding, Attorneys for Appellees.

STATEMENT OF THE CASE.

As counsel for appellant have in their statement inadvertently committed an error in setting forth a copy of the paper introduced in evidence and relied on by appellees as showing the exact terms of the trust assumed by Le Roy, we here insert it:

"SAN FRANCISCO, 27 Sept., 1871.

"To Messrs. J. B. Felton, S. M. Wilson and W. H. Patterson, Present.

"GENTLEMEN:—I hereby certify that you are entitled to the following sums, payable out of a certain

of Le Roy. Mr. Le Roy at first objected to making such large advances on the property, but after long and persistent persuasion by Mr. Felton, he consented to advance the amount required to accomplish the purpose, $397,849 in all. Mr. Felton was then, and had been for years, the confidential attorney and adviser of Le Roy, and besides their business relations, there existed between them a warm friendship. Mr. Felton conducted all these negotiations with Le Roy, which led up to and culminated in the trust deed which was executed October 1st, A. D., 1870. Rec., pages 2–6.

Mr. Felton prepared this deed of trust to Le Roy, which was executed by the Estudillos as security for his loan of $379,849, and he added to the amount so secured the sum of $49,000, which was the fee coming to himself and his associates, and making a total of $446,849 expressed in the deed. This $49,000 *was tacked on to the indebtedness* of $379,849 incurred by the Estudillos to Le Roy, as aforesaid, *upon the express understanding that it was to be paid only after Mr. Le Roy had been fully reimbursed his indebtedness, with interest, and expenses about the property.* By this deed the Estudillos became the trustors, and Le Roy the trustee and *cestui que* trust as to the amount due him. There was also a special trust in favor of Felton and his associates to the extent of $49,000 and interest thereon from the date of the deed, in case *sufficient was realized from the property to meet this after paying Le Roy in full.* During the year 1871, Mr. Rudolph Steinbach was employed by Le Roy to take charge of this property, and upon assuming his duties found no evidence of the conditions upon which

the $49,000 was added to the amount of $379,849, due to Le Roy, and making up the sum of $446,849 expressed in the deed, and thinking, as a prudent business man, that there should be some evidence of the same in writing, applied to Mr. Felton in the matter, and thereupon the paper hereinbefore set forth was prepared by Mr. Felton and signed. At the time that Mr. Felton induced Le Roy to enter into this transaction, he represented to Le Roy that the whole business could probably be wound up within a year; but the property became involved in litigation, patents to a portion had to be procured from the United States government, and so, from one delay and another, the business ran along until September, 1874, when Mr. Felton filed a complaint in behalf of Le Roy against the Estudillos in the District Court of California for the County of Alameda, to foreclose this trust deed and have the property sold, and the trust wound up.

In December, 1876, the defendants in this foreclosure suit appeared by their attorney, William H. Patterson, and filed their answer and a cross-complaint. In April, 1877, the plaintiff, Le Roy, by Mr. Felton, his attorney, filed a replication to the defendants' cross-complaint. In May, 1877, Mr. Felton having died, Mr. B. S. Brooks was substituted as attorney for plaintiff in this foreclosure proceeding, and prosecuted the same to final judgment, which was obtained January 10th, 1879; and during the months of April and May, 1880, the whole trust property remaining undisposed of was sold under said judgment, and did not realize enough by the sum of $35,617.28 to reimburse Le

me that he had a perfect confidence in the sufficiency of the security) that there was due to him and others about $40,000. Mr. Felton did not state the exact sum of $49,000, which was afterwards stated, but at that time spoke of the amount as being about $40,000. That was what determined me upon entering into the business. Mr. Felton telling me (to show me the absolute confidence that he had himself in the sufficiency of the security, and that I was perfectly safe in doing this business), that the sum of about $40,000 was due to him and others, and that sum would not be paid to them until I should be entirely paid for the advances I had already made, the advances I was to make and any advances that I would make in the future, and the interest on them. That was the only thing that determined me, and I only consented with this express condition, that I should be entirely paid as I have stated, capital and interest on my advances before this sum of about $40,000 referred to should be paid." Rec. pp. 48, 49.

He further states that Mr. Felton first mentioned or proposed adding this $49,000 at the time that he, Le Roy, refused to undertake the business, and that in this negotiation Mr. Felton represented the Estudillos as well as himself; that he was not only his particular friend, but his sole counsel and adviser, and had occupied that position for several years, also that Mr. Felton stated he believed the whole business could be wound up within a year. Rec. pp. 49, 50, 51.

That the negotiation was with Mr. Felton alone and he had no conversation with Mr. Patterson or Mr. Wilson about it. That he understood when Mr.

Felton explained it to him that of the $49,000 there was $25,000 coming to Mr. Felton, $12,000 to Mr. Patterson, and $12,000 to Crittenden & Wilson; this was several months after the deed of trust had been made. That in the beginning he did not know the particulars about it. He believed Mr. Felton and Mr. Nugent were to get a part and perhaps other people, but did not know exactly the amounts. He also thought that Mr. Patterson was to have something, but as to Crittenden & Wilson, he never knew it; he was not aware what the counsel fees were for. He never paid Mr. Felton anything on account of this $49,000. Never made any agreement with them about it except the one that is in the letter which was written. He had no agreement with Mr. Patterson or Mr. Wilson about it. Rec. pp. 57, 58.

Upon this point Mr. Steinbach also testifies as follows:

"I have had the management of the property since October, 1871. I occupied the same office with Mr. Le Roy prior to the date of the deed of trust. In the months of August and September, 1870, I was present several times when Mr. Felton and Mr. Le Roy spoke of this subject. Mr. Felton was very urgent that Mr. Le Roy should do this business—make this transaction. I came back from the East at the end of July, 1870, and on the very day of my arrival Mr. Le Roy spoke to me on this subject, and told me that he was considerably troubled about it, and told me that negotiations had been pending for some time—for how long I could not say. From that time they continued until the deed of trust was executed. The cause of the

delay was that Mr. Le Roy did not want to advance any more money than he had already on the four mortgages which he held at that time. I could not say how many times Mr. Le Roy was in Mr. Felton's office about it, but I can remember three or four occasions when Mr. Felton was in Mr. Le Roy's office on this subject when I was present. It was just about the time of the date of the deed of trust, within a few days of its execution, that the exact sum of $40,000 was mentioned. I cannot tell precisely the date (when I first heard of the idea of including in this trust deed the provision for the lawyers), but it was mentioned on the very first occasion that Mr. Felton spoke to Mr. Le Roy in my presence about the trust deed or about the transaction. It was the great argument used by Mr. Felton in every conversation that he had with Mr. Le Roy in my presence on the subject. Mr. Le Roy was hesitating and afraid to go into it. Mr. Felton always urged this argument, with other arguments, in regard to the sufficiency of the security over and over again; but he insisted particularly and repeatedly on this, that Le Roy ought to be satisfied with the security, since they were satisfied to have him paid entirely first before they could get a dollar. Mr. Felton tried to explain to Mr. Le Roy the excellence of the investment which he urged him to make. He explained to him particularly the value of the San Leandro Ranch and of the other ranches that were to be transferred to him. He showed him or gave him a statement in detail of the lands in the San Leandro, made by Mr. Stratton. The valuations showed him that that ranch alone would be sufficient to pay

the advances which he was called upon to make, but Mr. Le Roy still hesitated. Then Mr. Felton told him he certainly ought to be satisfied with the security, since he and the other lawyers were satisfied that the money that was owing to them from the Estudillos should be paid after he, Mr. Le Roy, should be entirely paid, and that they were not likely to do that if they did not think the property was amply sufficient to pay both him and them, and, in fact, he said that he had no doubt that the Estudillos themselves would still have a good deal of property left after everybody was paid." Rec. p. 61, 62, 63.

" It was the end of September, 1871, about a year after the date of the deed of trust, when I made an arrangement with Mr. Leroy in reference to the management of the estate. In examining the deed of trust and the papers that Mr. Le Roy at that time had, the accounts and vouchers and other papers he had at that time, I did not see among the papers any paper stating precisely the conditions of the $49,000. In fact, no paper that showed that there was any particular sum mentioned in the deed of trust that belonged to anybody but Mr. Le Roy. I thereupon made the remark to Mr. Le Roy that there ought to be such a paper, that those who were interested in the $49,000 which did not belong to him, ought to have such a paper, he himself ought to have such a paper, stating the conditions. He agreed with me, and I thereupon went to Mr. Felton and told him that I had found no such paper, and that if there had not been one made, it ought to be made then and there. He then and there

drew up a letter, which he proposed that Mr. Le Roy should sign a draft of which I have here now. It is all in his handwriting, done in my presence. I then went to my office and made two copies of that letter, and Mr. Le Roy signed them. Mr. Felton gave me this draft and requested me to make two copies of it, have Mr. Le Roy sign them and bring them to him. I did so. I went to the office, made two copies, had Mr. Le Roy sign them and brought them to Mr. Felton. One of them I left with him, and the other he returned to me after writing the sentence which appears at the bottom, 'This is the true understanding about the above interests, John B. Felton, September 27, 1871.' This letter was dated the day it was written and signed." Rec., pp. 63, 64.

Mr. Steinbach further testifies that in the year 1873 he had a conversation with Mr. Samuel Wilson (one of the attorneys interested in this $49,000), and John Nugent, in Washington; that Mr. Nugent had then gone to Washington to obtain a patent of the Guadalupe Ranch, which is a portion of the property mentioned in the deed of trust, and he says:

"I was in company with Mr. Nugent and met Mr. Samuel Wilson, and both myself and Mr. Nugent tried to induce him to help as much as he could in the matter of the Guadalupe patent. I gave him as my opinion that if the land which was at that time, in dispute, which was not covered by the old patent, and which was included in the new patent which we were trying to obtain, that if that piece of land were lost to the estate of the Estudillos, I saw no chance what-

ever that he, Mr. Wilson, would ever get anything for his interest in the $49,000; that the property would not be sufficient to pay Mr. Le Roy, and consequently, that he could get nothing. Mr. Wilson made no reply to that. Mr. Nugent only suggested that he had no doubt that there was plenty of property left, even if that was lost. Mr. Wilson then told us that he could not possibly stay in Washington; he had to go back to New York, and we did not get his aid in that matter." Rec., p. 65.

Also that he had frequent conversations with Mr. Patterson on this subject. Rec., p. 65, q. 20.

There was no attempt to contradict this testimony, either by Mr. Patterson or by Mr. Wilson, both assignors of the appellant.

After the execution of the trust deed, Mr. Patterson acted as the attorney of the Estudillo family; from the date of the deed to the inception of the foreclosure proceedings, Mr. Le Roy made large private sales from the trust property, by virtue of his power under the deed, and received the money therefor, but no claim was preferred on the part of these attorneys for a *pro rata* share thereof.

In the foreclosure suit of Le Roy against the Estudillos—the printed transcript of the proceedings in which was omitted by stipulation from the record herein Rec., p. 193, with leave to either party to quote therefrom in the printed briefs—Mr. Le Roy was examined as a witness on July 19th, 1877, and *then* testified touching this $49,000 as follows, viz:

"Q.—Don't you know that the defendants—the

Estudillos — were indebted to Felton, Patterson and Wilson for services to a very large amount. say upwards of $20,000, and that you agreed to assume and pay the same; and that that amount entered into and made a part of the amount specified in the deed of trust?

"A. — I don't know now how to answer. I only know that I had an agreement with Mr. Felton not to pay any of these lawyers until I got all my money, interest and advances and commissions The amount of the claims of Felton, Patterson and Wilson, which was included in the deed of trust, is $49,000." (Printed Transcript, p. 335.)

It will be remembered that William H. Patterson, one of the assignors of the appellant herein, was one of the attorneys for the defendants in that foreclosure proceeding.

The high character of Mr. Felton ought to put an end to any suggestion that the original understanding was different from that expressed by the paper which he afterwards signed for the *sole purpose* that such understanding might be evidenced in writing. It cannot for a moment be supposed that Mr. Felton could have lent himself to the perpetration of a fraud upon his associate attorneys. The arrangement of the whole matter of this $49,000 fees was delegated to Mr. Felton by the other interested attorneys; they had nothing to say to Mr. Le Roy about it; having left the whole matter to Mr. Felton, they are bound by his acts; they cannot accept a part of his arrangement and repudiate a part; for to allow this would be a manifest injustice to Le Roy.

It is upon this ground that the declaration of Mr. Felton in writing as to the conditions of this trust was clearly admissible, in view of the attendant circumstances, not to show a new understanding, but the *precise terms* of the agreement under which the $49,000 was added to the trust deed. The other attorneys having made Mr. Felton their agent in the transaction, his declarations are admissible, as against them, to show what the arrangement was.

Counsel for appellant claim that if there was any such understanding about the postponement of the payment of this $49,000 to that of Le Roy's advances, it should have been expressed in the trust deed; but they forget that the Estudillos and Le Roy were the *sole* parties to that deed. The claim of the attorneys was in the nature of a second mortgage, and for *their convenience* Mr. Felton induced Le Roy to permit it to be tacked on to his first claim, but upon this separate agreement that it was to be second and subordinate thereto. That was an arrangement to which the Estudillos were not parties, and in which they were not interested. It would be palpably inequitable to permit the attorneys to show by parol that their claim was tacked to that of Le Roy, but preclude the latter from showing the *conditions* under which it was done; particularly as Mr. Felton, when so acting for the benefit of himself and his associates, was the sole attorney and adviser of Le Roy.

It is not pretended that any one had any knowledge on the subject but Felton, Le Roy and Steinbach. Mr. Felton negotiated the transaction and knew just what it was; he is dead and cannot testify; but he has

left behind him a declaration in writing made against his own interest; it is in precise accord with the testimony of Le Roy and Steinbach, which is corroborated by circumstances; it is in precise accord with the natural presumptions and equities.

No point is made by the appellees as to the origin of this claim of $49,000, or whether it was, in fact, owing from the Estudillos to these attorneys; they concede that for the purposes of this case, it may be assumed to have been a valid indebtedness.

There can be no possible reason for ordering an accounting between Le Roy and the pretended representative of these claims of Wilson and Patterson, to ascertain if Mr. Le Roy has been more than paid, or for any purpose, for that was fully gone into on the trial of this cause, and itemized accounts showing all the receipts and expenditures of Le Roy from the inception of the trust, were put in evidence and appear in the printed transcript, before referred to, from page 80 to page 306, and Mr. Steinbach testified that these accounts were correct; also, that all the trust property had been sold, leaving this deficiency of $35,617.28 still due to Le Roy on account of his original advances. Rec., p. 79. And he produced statements in detail showing this deficiency. Rec., pp. 189, 190. Respondent's Exhibits, 20 and 21.

Mr. Le Roy also testified on this subject:

"Q. 53. At the time you commenced your suit for the foreclosure of the trust did you file with your com-

plaint accounts showing all the receipts and payments made by you?

"A. Yes, I did." Rec., p. 56.

No testimony whatever was offered to contradict this showing.

The judgment in the foreclosure suit of Le Roy against the Estudillos, decreed that all the property embraced by this trust deed, and then undisposed of, should be sold at public auction—and it further provided that Le Roy might be a purchaser at such sale. Rec., p. 215. It was also shown that extraordinary measures were taken to attract purchasers to the sale of this property. Rec., pp. 80, 81. There was no suggestion on the part of complainant upon the trial that the sales were not fairly made, and for the best attainable prices. The presumption is that such was the case. No useful purpose could be subserved in going over these accounts again, and presumably with the same result.

The prayer of the bill was for an accounting by Le Roy. Rec., p. 7.

We assume that all intendments are to be taken in favor of the judgment of the Court below, and it appearing that this question was passed upon by that Court, and no error being pointed out in that regard, its judgment, in this respect, will not be interfered with on appeal—especially for the benefit of a prowling assignee.

The complainant is a mere *volunteer*. No right of his has been interfered with. He has no equity of his

own to assert. Neither of the original parties complain. A stranger to the transaction, an assignee without consideration, comes into a court of equity to claim its relief for injuries to others who have made no complaint. Patterson assigns his claim to McLaughlin January 30, 1880. McLaughlin assigns to Kirkpatrick April 7th, 1880. Kirkpatrick assigns to complainant on the same day. Mr. Wilson assigns to Mrs. Crittenden, February 15th, 1872 for the expressed consideration of friendship only and in the way of a gift. Mrs. Crittenden assigns to the complainant in May, 1880, for the expressed consideration of five dollars. Rec. pp. 108, 109.

Kirkpatrick in his testimony pretends that the assignment to him by McLaughlin was done as part of a transaction which afterwards fell through; "ultimately not wishing to control the matter myself *which I had expected to do* in my transactions with Mr. Newhall, I made this assignment to him." But the two assignments are made *on the same day.* He cannot explain it. He does not know what is meant by the question "Did you pay anything to Mr. McLaughlin for it?" He cannot tell what the consideration was. He had charge of the property for Mr. McLaughlin. Cannot tell whether Mr. McLaughlin owed him anything or whether he released Mr. McLaughlin, nor whether he credited him, nor whether he agreed to, nor "*perfectly*" what his interest was to be. "I was to have the whole benefit when the assignment was made to me. The assignment not having been, *perhaps*, carried out on my part, *perhaps* that would be a

proper way to state it. I then assigned to Mr. Newhall.".

Q. Did Newhall pay you any money?

A. No, sir. Newhall holds it for his own benefit. Paid him nothing. Can't say that I paid anybody anything for it.

"I could not afford to buy it." "I had no distinct agreement to buy it from him—no. There was nothing paid by anyone."

There had evidently been something written below the first assignment which had been torn off, but he cannot tell what it was nor explain it. He has no memory for the questions put to him. Rec. pp. 32 to 39.

There was no attempt to prove any consideration paid for the assignment of Mrs. Crittenden. The claim of a volunteer presented under such circumstances does not commend itself to the favorable consideration of a court of equity.

Before considering the legal points of the case we cannot omit to refer to the criticisms which counsel for the appellant have seen fit to place upon the testimony of Mr. Steinbach, who by his care and caution saved Mr. Le Roy from the uncertainties of parol evidence as to this question of priority, by taking the written acknowledgment of his friend Felton; it was a neglect of duty upon the part of Mr. Felton, at the outset, not to put in writing the circumstances under which the $49,000 was added to the trust deed, and which can only be excused on the ground of the intimate rela-

tions existing between Mr. Felton and Le Roy and the conviction on the part of Mr. Felton, unmindful of death, that Le Roy was at all times *safe in his hands*; it was the event of death which Mr. Steinbach feared and anticipated by this writing. We submit that his action in this respect commends him as a man of foresight and business sagacity.

The learned counsel for appellant may not fully appreciate with what facility *parol* evidence can be obtained in California to further and support a "syndicate" suit against a "money-lender."

A perusal of the decision of the U. S. Circuit Court for that district in *Sharon* vs. *Hill*, 9, West Coast Reporter, p. 1, might lead them to conclude that such operations were not even restricted to oral testimony.

Law of the Case.

The statute law of California regulating trusts in relation to real estate, at the time this deed was executed, was as follows:

"No estate or interest in lands other than leases for a term not exceeding one year, *nor any trust* or power over or concerning lands, or in any matter relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, *or declaring the same*, or by his lawful agent thereunto authorized by writing." 1 Hittel Gen. Laws, sec. 3150; Stats. 1850, p. 266, sec. 6.

"The preceding section shall not be construed * * * to prevent any trust from arising or being extinguished by implication or operation of law." 1 Hittel Gen. Laws, sec. 3151; Stats. 1850, p. 266, sec. 7.

It is obvious that there is no trust in this case declared by writing, signed by Le Roy, unless by this instrument in writing drawn up by Mr. Felton and signed by him. Under the terms of that instrument, no trust arises in favor of the complainant. We contend that if there is any trust in this case it is an express trust by parol, and must stand on Le Roy's statement and the evidence adduced in support thereof, including the writing signed by Mr. Felton.

There is no resulting trust here, because there is an express declaration of trust.

We cannot agree with the learned counsel for appellant in their contention that in this case a trust *in relation to lands*, arose by implication or operation of law in favor of the attorneys, from the circumstance that the $49,000 coming to them was included in the trust deed. As between the Estudillos and Le Roy, the trust deed, though in form absolute, was nevertheless only a mortgage; the transaction was only in the way of a security, and the legal title to the property did not pass.

Dutton vs. *Warschauer*, 21 Cal., 623;
Grattan vs. *Wiggins*, 23 Cal., 16;
Cunningham vs. *Hawkins*, 27 Cal., 603;
Taylor vs. *McClain*, 60 Cal., 651;
Taylor vs. *McClain*, 64 Cal., 513.

We do not understand that this is a case like *Hiddon* vs. *Jordan*, 21 Cal., 92, and those of like import, cited by appellant, where a conveyance of land is made to one person, and the whole, or a part, of the purchase money is paid by another, the grantee, in consequence, holding the land in trust for the person who pays the consideration. In the case at bar, the attorneys were only to receive a portion of the *proceeds* of this security, upon the contingency that Le Roy was first paid in full; they were mere *beneficiaries*, and as such, *took no estate or interest in the property*, but could enforce the performance of the trust. Civil Code of Cal., sec. 863.

"But, though there may be a trust of a part only of the estate by implication of law, it must be of an *aliquot* part of the whole interest in the property. The *cestui que trust* to whom the trust results must become, by the operation of law upon the estate, a tenant in common with the grantee of the whole interest vested in him by the grant. There can be no resulting trust of the whole estate to a given extent of the value of it, leaving the residum, if any, of the value, to the grantee; nor can an estate result to the party who pays the consideration as a pledge or security for the money so paid, and, on the re-payment, to return to and vest in the nominal grantee. Those interests may be created, or protected and secured, by mortgage of the estate, by express trust, or by liens upon it. But when an estate results by implication of law, the title and legal estate of the whole, or of some

aliquot part of the whole, must vest in the party to whom it results."

Wheat vs. *Carpenter*, 2 Paige's Ch. Rep., p. 239.

If Le Roy had collected the full amount named in the deed of trust, and had refused to pay over to Felton and his associates the portion coming to them, an action at law could have been maintained by them against him for this sum.

Kreutz vs. *Livingston*, 15 Cal., 344.

But even conceding that there was in this case a resulting trust in relation to real property, arising by operation of law under the trust deed, we insist that such resulting trust may not only be proved by parol, but may also be defeated by parol proof of an agreement to a different trust from that which would be implied by law.

Bayles vs. *Baxter*, 22 Cal., 575;
Millard vs. *Hathaway*, 27 Cal., 119;
Roberts vs. *Ware*, 40 Cal., 637;
Story's Eq. Juris, Sec. 1202;
Botsford vs. *Burr*, 2 Johns. Ch., 406;
Roe vs. *Popham*, Doug., 24;
Walker vs. *Walker*, 2 Atk., 98;
Lake vs. *Lake*, Amb., 126;
Bellasis vs. *Compton*, 2 Vernon, 294;
Page vs. *Page*, 8 N. H., 187;
Jackson vs. *Feller*, 2 Wend., 465.

"The real office of the parol evidence in such a case is not to vary the contract in writing, but to establish the circumstances of a collateral fact, which, when established, controls the deed."

Troll vs. *Carter*, 15 West. Va., 577.

When Le Roy, under the judgment in the foreclosure suit permitting him to do so, bought in the property he became the sole and exclusive owner of the same divested of all trust. Mr. Felton instituted the foreclosure; he must have intended to cut himself off by that proceeding, because he was also the attorney of the Estudillos, and it cannot be admitted that he intended to foreclose them and not himself, and so obtain an unfair advantage over his clients. The presumption is that he acted honestly, both as to the Estudillos and Le Roy, and it would manifestly be of no advantage to the latter to get rid of his trust relations with the Estudillos through this foreclosure, unless he could wind up the whole business and become a purchaser on his own account; else why be at all the expense of this foreclosure and put his claim into a judgment to thereafter bear interest at the rate of seven per cent. per annum, instead of fifteen, as before? This presumption of honesty is in the nature of evidence. Thus under the former strict rules as to identity in following up money where it appeared that a thief had mingled stolen money with his own on deposit in bank, and then drawn out a portion, the law would presume, in favor of honest dealings and justice, that he had withdrawn his own and left the part that was

stolen. And such residue would be decreed to be paid over to the owner as the *identical* money of which he had been deprived. As illustrating this doctrine see

Nat. Bank vs. *Ins. Co.*, 104 U. S. 54;
Knatchbull vs. *Hallett*, L. R. 13 Ch. . Div., 696.

Le Roy had the legal right to buy in this property at the judicial sale, and he thereafter held it as his own in fee simple absolute.

Wright vs. *Ross*, 36 Cal., 414, 445, 446.

The attention of the Court is requested to the first opinion in this case (pp. 431–2), which announces a doctrine quite similar to that asserted by the appellant, following *Hoyt* vs. *Martense*, 16 N. Y.. 233, and that line of authorities; while the second and prevailing opinion (p. 446), announces the principle which we assert in this case, namely, that it was *not* at all incumbent on Le Roy to buy in this property at the judicial sale; that if he had failed to purchase at any price, none of the beneficiaries could have complained; and having elected to buy in to protect himself, he is entitled to the exclusive benefit of the purchase, unless by *the terms of the trust deed* Le Roy was denied the usual right of a creditor to buy in the property at judicial sale for his own protection; and not only is there nothing in that deed to such effect, but the foreclosure being a proper proceeding, there is nothing to justify the belief that any of the beneficiaries contemplated he should be deprived of the right to buy in the property for his exclusive benefit. There was nothing

left for Le Roy but to buy in this property, as no one would bid the amount of his debt. The last opinion was the law in the State of California at the time the trust deed was executed, and ever since. In support of the doctrine laid down in *Wright* vs. *Ross*, we cite the opinion of this Court in

Twin-Lick Oil Co. vs. *Marbury*, 91 U. S., 587, 590, 591.

A mortgagee, in order to avoid a loss to himself, by a sale to a stranger, at a less price than he is willing to pay, may purchase, at a judicial sale, when he is both a trustee and a *cestui que trust.*

Jones on Mortgages, secs. 1636, 1881, 1882;
Bergin vs. *Bennett*, 1 Caines C., p. 9, 19.

It must be borne in mind that this transaction was between Le Roy and Mr. Felton, his confidential legal adviser and intimate counsellor of many years standing, in whom he had unlimited confidence; that it was entirely and solely for the benefit of said lawyer and his associate lawyers; and that the proposed postponement of Mr. Le Roy's security is *totally without consideration.* In such cases equity does not permit a lawyer to obtain any advantage over his client.

Wood vs. *Downes*, 18 Vesey, 126;
Jones vs. *Tripp*, Jacob, 322;
Montesquieu vs. *Sandys*, 18 Vesey, 302;
Caine vs. *Ld. Allen*, 2 Dow, 284;
Edwards vs. *Meyrick*, 2 Hare, 68;

Gibson vs. *Jeyes*, 6 Vesey, Jr., 270, 280;
Tiffany & Bullard on Trusts, 187;
Story's Eq. Jur., 219, 310, 311 & 401;
Howell vs. *Ramson*, 11 Paige Ch., 540, 542;
Jennings vs. *McConnell*, 17, Ill., 150;
Ford vs. *Harrington*, 16 N. Y., 288, 289;
Evans vs. *Ellis*, 5 Denio., 640, 643.

We confess that we are unable to see the force of the argument in behalf of appellant, that, because Le Roy made a fortune off this single investment, it was his duty, as a trustee, to pay the lawyers as "the first step of proceeding under the deed." How these lawyers could become favored and preferred creditors contrary to the contract and to law, we cannot perceive—more particularly as their claims were intruded into the deed at their solicitation only. "Though creditors," the Court said, "are favorites, we must not pay them out of other men's estate, nor, as Justice Twisden was wont to say: *steal leather to make poor men's shoes.*"

Earl of Plymouth vs. *Hickman*, 2 Vernon, 167.

We submit that the decree of the Court below should be affirmed.

EVANS S. PILLSBURY,
Attorney for Appellees.

PILLSBURY & BLANDING,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~290~~ 54

THE CITY OF NEW ORLEANS; THE BOARD OF ASSESSORS OF THE STATE OF LOUISIANA IN AND FOR THE PARISH OF ORLEANS, BY E. T. LECHE, PRESIDENT THEREOF; AND THE INDIVIDUAL MEMBERS OF SAID BOARD, VIZ: E. T. LECHE, J. B. WALTON, P. MULOCHE, A. M. ANCOIN, J. H. FINNEGAN, J. C. BACH, AND HENRY TEBBE; CHARLES F. BUCK, CITY ATTORNEY; AND J. W. GURLEY, JUNIOR, LATE ASSISTANT CITY ATTORNEY, APPELLANTS,

vs.

J. D. HOUSTON, STATE TAX COLLECTOR AND THE LOUISIANA STATE LOTTERY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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Bill of Complaint. Filed January 27th, 1881.

1 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

LOUISIANA STATE LOTTERY COMPANY
vs.
JAMES B. WALTON *et al.* } No. 9279.

To the hon. the judges of the circuit court of the United States for the district of Louisiana:

The Louisiana State Lottery Company, a corporation under the laws of the State of Louisiana, domiciled in New Orleans, and a citizen of the State of Louisiana, brings this its bill against James B. Walton, A. M. Aucoin, P. Malochee, John Curry, J. H. Finnegan, and Henry Tebbe and J. C. Bach, tax assessors for the parish of Orleans, State of Louisiana, and against the City of New Orleans and against Joseph A. Shakespeare, mayor of the city of New Orleans, and against Charles F. Buck, Esq., city attorney of said city of New Orleans, and against J. Ward Gurley, Jr., Esq., assistant city att'y of said
2 city of New Orleans, each and all of said defendants being citizens of the State of Louisiana; and thereupon your orator complains and says:

That by an act of the Legislature of the State of Louisiana passed in 1868, being act No. 25 of that year (session acts of 1868, p. 24), your orator was duly established and organized as a corporation and domiciliated in the city of New Orleans under the name and style of The Louisiana State Lottery Company, and by said act certain privileges, immunities, and franchises were granted the said company, and your orator's said company went into existence by said act, and your orator has been transacting business thereunder since the 1st day of January, 1869, and has in all respects complied with all the provisions and stipulations in said act.

That among other immunities and franchises granted by said act to your orators it was and is therein provided in the first section of article 5 of said act that your orator "shall pay the State of Louisiana the sum of forty thousand dollars per annum, which sum
3 shall be payable quarterly in advance from and after the first day of January, 1869, to the State auditor, who shall deposit the same in the treasury of the State, and which shall be credited to the educational fund; and said corporation shall be exempt from all other taxes and licenses of any kind whatever from the State, parish, or municipal authorities."

That in the year 1871 a controversy arose between your orator and the city of New Orleans as to the liability of said company for city taxes, in the course of which said city of New Orleans alleged and pretended that the exemption of your orator, as above set forth in said article 5, section 1 of its charter, was contrary to the constitution of Louisiana, and therefore illegal, and your orator was consequently liable to be taxed by the city of New Orleans; that said

controversy resulted in the institution of legal proceedings between your orator and said city of New Orleans in the then superior district court for the parish of Orleans, in a suit entitled the "Louisiana State Lottery Company *vs.* The City of New Orleans *et als.*,
4 No. 474 of the docket of said court; that said suit resulted in a judgment in favor of your orator recognizing the validity of its exemption from all other taxes except those set forth in said article 5, section 1, of its aforesaid act of incorporation; and therefore said suit was carried by said City of New Orleans on appeal to the supreme court of the State of Louisiana, the highest court of jurisdiction known to the laws of Louisiana; and after a regular hearing before said supreme court the aforesaid exemption of your orator from State and city taxes and licenses was again declared to be valid, the power of the Legislature of Louisiana to impose a commutation tax was recognized, and the judgment of the lower court was affirmed; all of which will more fully appear by reference to the opinion and decree of said supreme court of Louisiana, reported in the 24th volume of Louisiana annual reports, at page 86, which is hereby prayed to be taken for and made a part of this bill.

That the said act of the Legislature having been accepted
5 by your orator is a contract between the State of Louisiana and your orator, and, as so construed as aforesaid by the supreme court of Louisiana, has been continued in force and declared, confirmed, and recognized as such by the present constitution of the State of Louisiana, adopted in 1879, article 167, all the provisions of which have been complied with by your orator.

And your orator further complains and says that, notwithstanding the provisions of the act of the Legislature of Louisiana as hereinbefore set forth, and in defiance of the decree of the supreme court of Louisiana above quoted, and of the constitution of Louisiana as hereinabove set forth, certain officers of the State of Louisiana, defendants herein, viz: J. B. Walton, A. M. Aucoin, P. Malochee, John Curry, J. H. Finnegan, Henry Tebbi, and J. C. Bach, are about to levy and assess a tax upon the capital stock and other property of your orator, and the other defendants hereinbefore named have threatened, and are about to take, proceedings against your orator for the collection of said illegal tax, which is illegal because prohibited by the Constitution of the United States as violative of
6 the said contract between your orator and the State of Louisiana; that one of said defendants, James D. Houston, State tax collector, as aforesaid, has threatened, by serving a notice to that effect, to seize and sell the property rights and credits of your orator, and has threatened to take other vexatious measures against your orator; and said city of New Orleans, and said Charles F. Buck, its attorney, and said J. Ward Gurley, Jr., its assistant attorney, as aforesaid, threathen to take other and vexatious measures against your said orator to compel payment of said illegal assessment of taxes, all of which proceedings are unwarranted by law, and are illegal and oppressive.

That said officers of the State of Louisiana, in thus tortuously acting towards your orator, pretend so to do under the provisions of

act No. 77 of the Legislature of Louisiana of 1880, which said law is null and void and of no effect, so far as your orator is concerned, inasmuch as by authorizing the levy of a tax upon the property
7 of your orator, other than that provided for in the charter of your orator as aforesaid, said act violates the contract between your orator and the State of Louisiana, by requiring of your orator other taxes than those provided for in said charter, and is repugnant to the paragraph 2, section 10, of article I of the Constitution of the United States.

That your orator has always promptly paid the amount called for by its said charter to the State treasury and in advance, and now owes nothing to said State, and that unless said defendants are enjoined by this honorable court they will carry out their said threats to the irreparable injury of your orator.

That the matter in dispute herein exceeds the sum of five hundred dollars,, exclusive of costs; the capital stock of your orator being one million of dollars, and said matter in dispute wholly arises under the Constitution of the United States, and this honorable court has jurisdiction thereof by virtue of the act of Congress of the United States, approved 30 March, 1875, entitled "an
8 act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."

All of which actings, and doings, and pretences of the said defendants are contrary to equity and good conscience, and to the manifest wrong, injury, and oppression of your orator in the premises, & involve a multiplicity of suits & heavy & vexatious charges & expenses.

In consideration whereof and inasmuch as your orator is remediless in the premisess at and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this kind and nature are cognizable and relievable, may it please your honor to grant a writ of injunction issuing out of this honorable court and directed to J. B. Walton, A. M. Aucoin, P. Malochee, John Carry, J. H. Finnegan, Henry Tebbe, and J. C. Bach, tax assessors of the parish of Orleans, State of Louisiana, enjoining and restraining them, and each of them, from
9 levying or assessing any tax upon the capital stock or other property of your orator, and that said writ of injunction be also directed to James P. Houston, State tax collector of the parish of Orleans; Joseph A. Shakespeare, mayor of said city of New Orleans; Charles F. Buck, city att'y of said city of New Orleans; and J. Ward Gurley, Jr., assistant city att'y of said city of New Orleans, enjoining and restraining them, and each of them, from proceeding any further in the collection of any tax assessed by the officers of the State of Louisiana and city of New Orleans against your orator, either by the suit or by seizure and sale of the property rights and credits of your orator, and from in any manner disturbing or harassing your orator *in any manner* relative to said taxes or any other tax against your orator, except those provided for in section 1, article 5, of said act of the Legislature of Louisiana, being act No. 25

of the session acts of said State of the year 1868, either by themselves or by their agents or employees, and that your honors will decree that the said act of the Legislature of Louisiana No.
10 77, of 1880, so far as it effects or concerns your orator, be declared to be repugnant to the Constitution of the United States, and therefore utterly null and void and of no effect.

May it please your honors to grant unto your orator writs of subpœna issued out of this honorable court, to be directed to the said James B. Walton, A. M. Anconi, P. Maloché, John Curry, J. H. Finnegan, Henry Tebbe, and J. C. Bach, State assessors for the parish of Orleans, State of Louisiana; and to James P. Houston, State tax collector for the parish of Orleans, State of Louisiana; and the city of New Orleans, and to Joseph A. Shakespeare, mayor of said city of New Orleans; Charles F. Buck, Esq., city attorney of said city of New Orleans; and to J. Ward Gurley, Jr. Esq., assistant city attorney of said city of New Orleans, thereby commanding them, and each of them, at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable court, & then & there full, direct, and perfect answer make to all and singular the premises, & further to stand to, perform, & abide
11 by such further order, direction, and decree therein as to this honorable court shall seem meet or shall seem agreeable to equity and good conscience.

(Signed) THOMAS J. SEMMES,
JOSEPH P. HORNOR,
Solicitors.

(Signed) M. A. DAUPHIN,
President Louisiana State Lottery Company.

M. A. DAUPHIN, being duly sworn, deposes & says, that he is the president of the Louisiana State Lottery Company, the complainant in the foregoing bill subscribed by affiant; that he has read the same & knows the contents thereof, & that the same is true to his own knowledge, except as to the matters therein stated on information, and as to those matters he believes them to be true.

(Signed) M. A. DAUPHIN.

Sworn to and subscribed before me, this 29th day of January, 1881.

[SEAL.] (Signed) ANDREW HERO, JR.,
Not. Pub.

12 *Motion and Order for Restraining Order. Entered and Filed January 27th*, 1883.

U. S. Circuit Court, District of La.

LOUISIANA STATE LOTTERY COMPANY *vs.* JAMES B. WALTON *et als.*

On consideration of the bill filed in this cause and on motion of Joseph P. Hornor, one of the solicitors for complainants, it is ordered that this cause be set down for hearing upon the motion of complainants for the writ of injunction as prayed for in the bill upon

Saturday, the 5th day of February, 1881, at 11 o'clock a. m., at the United States court-room, in the city of New Orleans, La., and it appearing to the undersigned that there is danger of irreparable injury from delay, it is further ordered that a restraining order issue, and that the same be served on the defendants enjoining and restraining them according to the prayer of the bill; and that said restraining order remain in force until the hearing of said motion for injunction and until the further order of the court or a judge thereof, and that said defendants be served with a copy of
13 this order and notice.

(Signed) EDWARD C. PILLINGS, *Judge.*

Subpœna in Chancery to Defendants. Issued January 27th, 1881.

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the district of Louisiana, Greeting:

You are hereby commanded to summon James B. Walton, A. M. Aucoin, P. Maloche, John Curry, J. H. Finnegan, Henry Tebbe, J. C. Bach, James D. Houston, State assessors for the parish of Orleans, State of Louisiana; The City of New Orleans, Joseph A. Shakespeare, mayor of the city of New Orleans; Chas. F. Buck, attorney of the city of New Orleans, and J. Ward Gurley, Jr., assistant city attorney of the city of New Orleans, to appear before the honorable the judges of the fifth judicial circuit of the United States of America, at a circuit court to be holden on the first Monday of March, 1881, then and there to answer a bill in chancery filed
14 against him and others, wherein the Louisiana State Lottery Company [is] complainant, and Charles F. Buck and others are defendants.

Herein fail not, and have you then and there this writ, with your endorsement thereon how you have executed the same.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 27th day of January, in the year of our Lord one thousand eight hundred and eighty-one, and the 105th year of American Independence.

[SEAL.] (Signed) T. V. COUPLAND,
D'y Clerk.

The defendant is hereby notified that he is required to enter his appearance in the clerk's office of the United States circuit court on or before the first Monday of March, 1881; otherwise the bill may be taken *pro confesso.*

(Signed) T. V. COUPLAND,
D'y Clerk.

Received January 28th, 1881, by the U. S. marshal, and on January 29th, 1881, I served true copies of the within citation on
15 the foregoing-named defendants by handing the same to each one in person in the city of New Orleans.

(Signed) E. S. CURRY,
D'y U. S. Marshal.

Restraining Order to James B. Walton, A. M. Aucoin, P. Maloche, John Curry, J. H. Finnegan, Henry Tebbe, and J. C. Bach, Tax Assessors of the Parish of Orleans. Issued January 27th, 1881.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and District of Louisiana.

LA. STATE LOTTERY CO.
vs.
JAS. B. WALTON & *al.*
} No. 9277.

The President of the United States to J. B. Walton, A. M. Aucoin, P. Maloche, John Curry, J. H. Finnegan, Henry Tebbe, J. C. Bach, tax assessors parish of Orleans, Greeting:

Whereas it has been represented unto us in our said circuit court, on the part of the Louisiana State Lottery Company, in a bill
16 in equity lately exhibited against you and others, touching certain matters and things therein set forth; and whereas the Honorable Edward C. Billings, one of the judges of our said court, upon due consideration thereof, has made and allowed an order in said cause, whereby you, and each of you, are required to show cause, on the 5th day of February, 1881, at 11 a. m., why an injunction should not issue as prayed for in said bill of complaint; and whereas the said judge has granted and allowed an order restraining you, and each of you, immediately and forthwith and during the pendency of said motion for an injunction to the full extent and effect as prayed for in said bill of complaint:

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said J. B. Walton, A. M. Aucoin, P. Maloche, John Curry, J. H. Finnegan, Henry Tebbe, and J. C. Bach, tax assessors parish of Orleans, your agents, attorneys,
17 & servants, & each of you are hereby commanded and strictly enjoined under the penalty of the law that you, and each of you, absolutely refrain and desist from levying or assessing any tax upon the property of the Louisiana State Lottery Company, and that you, the said J. B. Walton, and other tax assessors of the parish of Orleans, as aforesaid, your agents, attorneys, and servants, and each of you remain so inhibited and restrained until the further order of our said court in the premises.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 27th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] (Signed) T. V. COUPLAND,
D'y Clerk.

Received Jan'y 27, 1881, by the U. S. marshal, and on Jan'y 28th, 1881, I served a true copy of the within restraining order on the persons herein named, to wit: James B. Walton, A. M.
18 Aucoin, P. Maloche, John Curry, J. H. Finnegan, Henry Tebbe, and J. C. Bach, tax assessors for the parish of Orleans,

by handing to each in person a true copy hereof, in the city of New Orleans.

(Signed) E. S. CURRY,
D. U. S. Marshal.

Restraining Order to James D. Houston, City of New Orleans; Joseph A. Shakespear, Mayor; C. F. Buck, City Attorney, and J. Ward Gurley, Jr., Assistant City Att'r'y. Issued January 27th, 1881.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and District of Louisiana.

LOUISIANA STATE LOTTERY COMPANY
vs.
JAS. B. WALTON *et als.* } No. 9277.

The President of the United States, to James D. Houston, tax collector, city of New Orleans; Joseph A. Shakespeare,
19 mayor of said city; Chas. F. Buck, city attorney, and J, Ward Gurley, Jr., Assistant city attorney, Greeting:

Whereas it has been represented unto us in our said court, on the part of the Louisiana State Lottery Company, in a bill in equity lately exhibited against you and others touching certain matters and things therein set forth; and whereas the Honorable Edward C. Billings, one of the judges of our said court, upon due consideration thereof, has made and allowed an order in said cause whereby you and each of you are required to show cause on the 5th day of February, 1881, at 11 a. m., why an injunction should not issue as prayed for in said bill of complaint; and whereas the said judge has granted and allowed an order restrain- yo u and each of you immediately and forthwith, and during the pendency of said motion for an injunction, to the full extent and effect as prayed for in said bill of complaint:

Now, therefore, in consideration of the premises, and of
20 the allegations in said bill contained, you, the said James D. Houston, Joseph A. Shakespeare, mayor; Chas. F. Buck, city att'y city of New Orleans; and J. Ward Gurley, Jr., ass't city att'y, your agents, attorneys, and servants, and each of you, are hereby commanded and strictly enjoined, under the penalty of the law, that you and each of you absolutely refrain and desist from proceeding any further in the collection of any tax assessed by the officers of the State of Louisiana against the Louisiana State Lottery Company, either by suit or by seizure and sale of the property, rights, and credits of the said company, in any manner, relative to said taxes, or any other tax against said company, except those provided for in section 1, article 5, of act of Legislature of La., being No. 25 of session acts of said State of La. of the year 1868, either by yourself, your agents, or employees.

And that you, the said James D. Houston, Joseph A. Shakspeare,

Chas. F. Buck, and J. Ward Gurley, and City of New Or-
21 leans, your agents, attorneys, and servants, and each of you, remain so inhibited and restrained until the further order of our said court in the premises.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 27th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL] (Signed) T. V. COUPLAND, *D'y Cl'k.*

Received Jan'y 27th, 1881, by the U. S. marshal, and on Jan'y 28, 1881, I served a true copy of the within restraining order on the persons herein named, to wit, City of New Orleans, by handing the same, to Jos. A. Shakspeare in person, the mayor of the aforesaid city, at his office in city hall; Joseph A. Shakespeare, mayor of city of New Orleans, by handing the same to him in person in city hall of said city; James D. Houston, by handing the same to him in person in said city; Charles F. Buck, by handing the same to
22 him in person in said city; J. Ward Gurley, Jr., Ass't dist. attorney, personally, at his office, No. 47 Camp street, this city.

(Signed) E. S. CURRY,
D'y U. S. Marshal.

Appearance.

Extract from Chancery Order Book, February 2d, 1881.

LOUISIANA STATE LOTTERY CO. *vs.* JAMES B. WALTON *et al.* } No. 9277.

James B. Walton, A. M. Aucoin, T. Maloché, John Curry, J. H. Finnegan, Henry Tebbe, and J. C. Bach, State tax collector for the upper district of said parish, by Whitaker & Adams, their solicitors, have this day entered their appearance to the complainant's bill of complaint.

Motion & Order for Injunction.

Extract from Minutes, November Term, 1880.

NEW ORLEANS, *Tuesday, March 29th,* 1881.

Court met pursuant to adjournment.

Present: Hon. E. C. Billings, district judge.

23 LOUISIANA STATE LOTTERY COMPANY *vs.* J. B. WALTON *et als.* } No. 9277.

On motion of Joseph P. Horner, solicitor for complainant, ordered that the motion for injunction *pendente lite* herein pending be set down for hearing on 2d April, 1881, at 11 a. m., and that defendants be notified.

Order Allowing Injunction.

Extract from Minutes of April 2d, 1881.

LOUISIANA STATE LOTTERY COMPANY
vs.
J. B. WALTON *et als.* } No. 9277.

This cause came on to be heard on the complainant's motion for an injunction *pendente lite*, and no objection being made it was ordered that the said motion be granted, and accordingly that the defendants herein be enjoined and restrained pending this suit as prayed for in complainant's bill of complaint.

24 *Answer of Defendants. Filed May 3d*, 1881.

United States Circuit Court, Eastern District of Louisiana. In Equity.

LOUISIANA STATE LOTTERY CO.
vs.
JAS. B. WALTON *et al.* } No. 9277.

The joint & several answers of J. C. Bach, A. M. Aucoin, Henry Tebbe, J. H. Finnegan, James B. Walton, John Curry, P. Malochee, State assessors for the parish of Orleans; James D. Houston, State tax collector for the upper district of said parish; the City of New Orleans, Charles T. Buck, city attorney of said city of New Orleans, and J. Ward Gurley, Jr., assistant city attorney of said city.

These defendants now, and at all times hereafter reserving all manner of benefit and advantage to themselves of exception to the many errors, insufficiencies in said bill contained, for answer
25 thereto, or unto so much or such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say: They admit the incorporation of the Louisiana State Lottery Co. by act 25 of 1868, and the grant of privileges, immunities, and franchises by said acts; they admit the existence of the Co. under said act, and that it has transacted business thereunder as alleged.

Defendants admit the immunities granted by said act, 1st sect., art. 5, and the exemption thereunder.

Defendants admit the existence of litigation between complainant and the City of New Orleans, as alleged in the bill herein, and aver that the decisions and decrees rendered by the courts of the State of Louisiana, in the matter referred to by complainant, do not affect the issues here.

Defendants admit that act 25 of 1868, and the acceptance thereof, made a valid contract between the State of Louisiana and complainant here.

26 Defendants admit that at the time of the issuance of the preliminary injunction herein the State assessors for the parish of Orleans were about to levy a tax upon the capital stock of the complainant and upon other — complainant's property.

These defendants deny that such a tax, its assessment, and collection are illegal.

And now one of these defendants, James D. Houston, State tax collector, as aforesaid, admits service of notice to seize and sell the property rights and credits of complainant, and to take the legal measures to enforce the collection of the tax complained of.

And it is true that the city of New Orleans and its attorney, Chas. T. Buck, and its assistant attorney, J. Ward Gurley, Jr., intend to compel payment of the taxes assessed as aforesaid on behalf of the city of New Orleans before the issuance of injunction herein, and they claim that this purpose was and is not illegal, and that its
27 execution will not be oppressive.

All of said officers deny that their action in this matter has not been and will not be tortious. They deny that act 77 of the Legislature of Louisiana of the session of 1880 is in any respect null and void.

They deny that said act is repugnant to the Constitution of the United States.

Defendants admit the payment of the amount called for by the charter of complainant as prescribed by law, and admits, further, that complainant is not indebted to the State of Louisiana.

Defendants admit jurisdiction in this court.

And these defendants, further answering, say that they deny that said act No. 77 of the State of Louisiana, legislative session of 1880, is repugnant to the Constitution of the United States and null and void.

These defendants aver that said act is constitutional in every
28 respect, and that complainant has no legal right to enjoin its execution

And these defendants submit to this honorable court that all and every of the matters in the said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity; and these defendants hope they shall have the same benefit of this defense as if they had demurred to the said complainant's bill; and these defendants deny all and singular the allegations of the bill herein, except in so far as hereinbefore specially admitted, and they pray for a decree in their favor and against said complainant as to all the matters put at issue herein, or that may arise herein, and for the their costs and for such relief in the premises as justice and equity warrant.

(Signed) WHITAKER & ADAMS, *Solicitors.*
(Signed) J. C. BACH,
29 *State Assessor for 6th Dist. P'h of Orleans.*
(Signed) AUG. M. AUCOIN,
Assessor 2nd Dist., P. Orleans.
" J. B. WALTON, *State Assessor.*
" JOHN CARRY, " "
" J. P. HOUSTON, " *Tax Collector.*
" CHAS. F. BUCK, *City Att'y.*
" J. WARD GURLEY, JR.,
Ass't City Att'y.
" JAS. H. FINNEGAN,
State Ass. 5th Dist.
" H. TEBBE, " " *7th* "

Subscribed and sworn to before me May 2d, 1881.
(Signed) F. A. WOOLFLEY,
Commissioner United States Circuit Court, Eastern Dist. of La.

Entry in Chancery Order Book May 3d, 1881.

LOUISIANA STATE LOTTERY CO. *vs.* J. B. WALTON *et al.* } No. 9277.

The defendants herein, by Whitaker & Adams, their solicitors' have this day filed their joint and several answers to the complainant's bill of complaint.

30 *Replication. Filed May 3d,* 1881.

United States Circuit Court, Eastern Dist. of La.

LOUISIANA STATE LOTTERY CO.
vs.
JAMES B. WALTON *et als.*

To the honorable the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The replication of the Louisiana State Lottery Company, complainant, to the answer filed by all the defendants.

This repliant saving and reserving unto himself all and all names of advantage of exception to the manifold insufficiences of the said answer for replication thereunto, saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this that any other matter or thing whatsoever in
31 the said answer contained material or effectual in the law to be replied unto, confessed, and avoided, traversed, or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

(Signed) THOMAS J. SEMMES,
JOSEPH P. HORNER,
Solicitors for Complainants.

Entry in Chancery Order Book. May 3d, 1881.

LOUISIANA STATE LOTTERY COMPANY *vs.* J. B. WALTON *et als.* } No. 9277.

The complainant herein, by Thomas J. Semmes & Joseph P Horner, its solicitors, have this day filed its replication to the joint and several answer- of the defendants herein.

32 *Motion & Order Case Fixed. Extract from Minutes of May 3d,* 1881.

LOUISIANA STATE LOTTERY COMPANY
vs.
JAS. B. WALTON *et al.* } No. 9277.

On motion of Joseph P. Horner, solicitor for complainant, ordered that the above case on bill & answer be set down for hearing on Saturday, 7th May, 1881, at 11 a. m., and that the defendants in said cases be notified.

Submission of Cause. Extract from Minutes of May 7th, 1881.

LOUISIANA STATE LOTTERY COMPANY
vs.
JAS. B. WALTON *et als.* } No. 9277.

By consent of counsel the above-entitled and numbered cause was submitted to the court for final adjudication on brief, to be furnished within 5 days.

33 *Decree. Entered & Filed June 16th,* 1881.

LOUISIANA STATE LOTTERY COMPANY
vs.
JAMES B. WALTON, *et als.* } No. 9277.

This cause came on to be heard on the bill, answer, replication, and other proceedings in the cause, and was argued by counsel.

On consideration whereof the court decrees and declares that the Legislature, No. 77 of the acts of 1880, so far as it imposes a tax upon the capital stock of the complainant, or upon the shares of the stock held by the shareholders of the complainant is in conflict with article 5, section one of complainant's charter, found in act No. 25 of the acts of 1868, and therefore impairs the obligation of a contract and is void.

The court further decrees and declares that under the provisions of said charter as adopted as a contract by the constitution of 1869,
34 the capital of the complainant, both in the aggregate and as held by its shareholders is exempted from all taxation of every kind excepting the annual payment of $40,000.

The court further decrees that the defendant herein be enjoined and restrained in manner and form and to the extent prayed for in the bill of complaint herein.

The court orders further that the defendants pay all costs of suit.

(Signed) EDWARD C. BILLINGS, *Judge.*

Petition for Appeal and order on co-Defendants, etc. Filed June 7th, 1883.

LOUISIANA STATE LOTTERY COMPANY
vs.
JAS. B. WALTON & OTHERS.

To the hon., the judges of the circuit court of the United States, fifth circuit and eastern district of La.:

The petition of the city of New Orleans through W. J. Behan (successor to Jos. A. Shakespear) of Chas. F. Buck, city att'y herein appearing for himself, and as solicitor for petitioners, and of J. W. Gurley, Jr., late assistant city att'y, respectfully shows that they
35 are informed and believe that there is error to their prejudice in the final decree herein entered and signed on the 16th day of June, 1881; that they are aggrieved thereby and are desirous of prosecuting an appeal therefrom to the Supreme Court of the United States.

Petitioners show that the amount involved to the city of New Orleans exceeds annually the sum of five thousand dollars, the minimum rate of tax being about 2%, and the capital of the complainant company, by her own allegations, one million of dollars.

Petitioners show that James D. Houston, State tax collector, and the State board of assessors, of which E. T. Leche is president, and the members individually of said board, to wit, J. B. Walton, A. M. Ancoin, P. Maloché, E. T. Leche, successor to Jno. M. Curry; J. H. Finnegan, J. C. Bach, and H'y Tebbe, are parties defendant in this cause and parties to the said final decree, and necessary parties to this appeal, and petitioners have no means of definitely as-
36 certaining whether said parties will join them in this appeal or refuse to do so, except by notice and summons to that effect to appear before this honorable court to make their election.

Wherefore these petitioners pray that an order issue herein summoning said J. D. Houston, State tax collector, the board of assessors, through E. T. Leche, president, and E. T. Leche, as member, and the members of said board, J. B. Walton, A. M. Ancoin, P. Maloché, J. H. Finnegan, J. C. Bach, and Henry Tebbe, to appear on a day to be fixed, in open court, then and there to declare or show cause whether they will or should join petitioners in the appeal of their so joining or appearing; that a separate appeal be allowed petitioners from said decree on their complying with requisites of law, and they pray, &c.

(Signed) C. F. BUCK,
Pp. and as Solicitor for other Petitioners.

Let the co-defendants of petitioners, as prayed for, be noti-
37 fied to be and appear in open court, at 11 o'clock a. m., on Tuesday, the 12th day of June, 1883, and to show cause, if any they have, or declare whether they or any or each of them are desirous of joining petitioners, the City of New Orleans, C. F. Buck, city att'y, and J. W. Gurley, Jr., late assistant city attorney, in an appeal from the decree herein rendered against them on the 16th of

June, 1881, and let them be further notified that in default of appearance on their part, or cause shown to the contrary of petitioners' prayer, an separate appeal will be allowed them herein, as prayed in the petition on file.

June 7th, 1883.

(Signed) EDWARD C. BILLINGS, *Judge.*

W. J. Behan, undersigned, duly sworn, deposes and says: That he is mayor of the city of New Orleans, and that the allegations in the petition as to the interest of the city are true and correct.

W. J. BEHAN.

Sworn to and subscribed before me this June 7th, 1883.

[SEAL.] (Signed) W. O. HART, *Notary.*

38 *Marshal's Return.*

Received June 8th, 1883, by the U. S. Marshal, and I served copies of the within petition, rule, and order to show cause on the persons herein named in the following date and manner, to wit:

J. H. Finnegan, a member of the board of assessors of the parish of Orleans and the city of New Orleans, left at assessors' office with Y. J. LeCorgne, June 11th, '83.

Henry Tebbe, member of the board as aforesaid, personally, June 11, '83.

J. C. Bach, member of the board as aforesaid, personally, June 11, 1883.

E. T. Leche, president and member of the board as aforesaid, left at office of assessors, city hall, with Y. J. LeCorgne, chief clerk, June 11, 1883.

J. B. Walton, member of the board as aforesaid, left at assessors' office, city hall, with Y. J. LeCorgne, chief clerk, June 11, 1883.

A. M. Aucoin, member of the board as aforesaid, p'lly, June 11, 1883.

39 P. Malochee, member of the board as aforesaid, left at assessors' office, city hall, with Y. J. LeCorgne, his clerk, June 11th, 1883.

Jas. D. Houston, State tax collector of the parish of Orleans and the city of New Orleans, in person, June 12th, 1883,

(Signed) J. R. G. PITKIN,
U. S. Marshal, East Dist. of La.
By DAN. A. ROSE,
D'y U. S. Marshal.

Order Granting Appeal. Entered & Filed June 12th, 1883.

United States Circuit Court, Eastern District of Louisiana.

LOUISIANA STATE LOTTERY CO. *vs.* JAMES B. WALTON *et als.* } No. 9277.

The rule herein taken by the City of New Orleans, C. F. Buck,

city attorney, and J. W. Gurley, Jr., late assistant city attorney, on June 7th, 1883, came on this day to be heard.

And it being made to appear to the court that the board of assessors, and the members of said board individually, were desirous of joining the city and others in their appeal, and it being
40 further made to appear that J. D. Houston, State tax collector, although duly served with notice to appear and elect, had failed to do so, and the court being satisfied that justice required that said petitioners and said Board of Assessors and the assessors individually should have a severance and be allowed an appeal:

It is ordered that City of New Orleans, said Chas. T. Buck, said J. W. Gurley, Jr., and said Board of Assessors, and the individual members thereof, to wit, James B. Walton, A. M. Aucoin, P. Maloché, E. T. Leche (successor to Jno. M. Curry), J. H. Finnegan, J. C. Bach, and Henry Tebbe, be allowed an appeal from said decree of June 16th, 1881, as prayed in the petition filed herein June 7th, 1883, on giving bond in the sum of two hundred and fifty dollars, conditioned as the law directs, returnable to the Supreme Court of the United States on the 2d Monday of October, 1883, and that said J. D. Houston and the Louisiana State Lottery Company, complainant,
41 be cited to answer this appeal.

New Orleans, June 12th, 1883.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bond for Appeal. Filed June 15th, 1883.

UNITED STATES OF AMERICA:

Know all men by these presents that we, the City of New Orleans, through W. J. Behan, mayor (successor to Jos. Shakspeare), Chas. F. Buck, J. W. Gurley, Jr., and J. B. Walton, A. M. Aucoin, P. Maloche, E. T. Leche, J. H. Finnegan, J. C. Bach, H. Tebbe, composing the board of assessors of the State of La. in and for the parish of Orleans, and said assessors, through E. T. Leche, its president, as principals, and Wm. O. Hart, as surety, are held and firmly bound, jointly and severally, unto the Louisiana State Lottery Company and J. D. Houston, State tax collector, appellees, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said La. State Lottery Company and J. D. Houston, tax collector, their heirs, executors, administrators,
42 and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 15th day of June, in the year of our Lord eighteen hundred and eighty-three.

Whereas the said above-named hereunto subscribed parties having heretofore, to wit, on the 12th day of June, 1883, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 16th day of June, 1881, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of the La. State

Lottery Company *vs.* J. B. Walton and others, No. 9277 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden parties, appellants, shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to
43 make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) J. B. WALTON, [L. S.]
Member B'd of Assessors.
A. M. ANCOIN, [L. S.]
Member Board of Assessors.
P. MALOCHE, [L. S.]
Member B'd of Assessors.
CHAS. F. BUCK,
H. TEBBE,
Member- B'd of Assessors.
E. T. LECHE,
Member & President.
J. C. BACH,
Member B'd Assessors.
JAS. H. FINNEGAN,
Member B'd Assessors.
W. H. BEHAN, *Mayor.*
J. WARD GURLEY, JR.,
W. O. HART, *Surety.*

Bond approved.
June 15th, 1883.
(Signed) EDWARD C. BILLINGS, *Judge.*

44 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 43 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of The Louisiana State Lottery Company *versus* James B. Walton *et als*, No. 9277 of the docket of said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 2d day of July, A. D. 1883.

(Two words interlined approved.)

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the

United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 2d day of July, A. D. 1883.

(Two words interlined approved.)

EDWARD C. BILLINGS, *Judge.*

45 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the Louisiana State Lottery Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Washington on the second Monday of October next, pursuant to a petition and order for an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit & eastern district of Louisiana, wherein the City of New Orleans, the Board of Assessors of the State of Louisiana in and for the parish of Orleans, by E. T. Leche, president thereof, and the individual members of said board of assessors, viz: E. T. Leche, J. B. Walton, P. Maloché, A. M. Aucoin, J. H. Finnegan, J. C. Bach, and Henry Tebbe; Chas. F. Buck, city attorney, and J. Ward Gurley, Jr., late assistant city attorney, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said above-named appellants, as in said petition and order for an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

EDWARD C. BILLINGS, *Judge.*

46 [Endorsed:] La. State Lottery Co. R. United States circuit court, eastern district of Louisiana. No. 9277. Louisiana State Lottery Company *et al.*, appellees, *vs.* J. B. Walton *et als.*, appellants. Citation to appellee.

Marshal's Return.

Received June 15, 1883, by the U. S. marshal, and on June 16th, 1883, I served a duplicate of the within citation of appeal on the Louisiana State Lottery Company, appellees herein, by leaving the same in the hands of M. A. Dauphin, Esq., in the city of New Orleans, the president of the aforesaid Lottery Company.

J. R. G. PITKIN,
U. S. Marshal Eastern District of La.,
By E. S. CURRY,
D'y U. S. Marshal.

Personally appeared before me, E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath tha- he served a duplicate of the within citation of appeal on the appellees herein named as set forth in his official return herein.

E. S. CURRY,
D'y U. S. Marshal.

Subscribed and sworn before me June 18th, 1883.

F. A. WOOLFLEY,
Commissioner Circuit Court, Eastern District of Louisiana.

47 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to J. D. Houston, State Tax Collector, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a petition and order for an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein The City of New Orleans, The Board of Assessors of the State of Louisiana in and for the Parish of Orleans, by E. T. Leche, President thereof, and the individual members of said Board of Assessors, viz., E. T. Leche, J. B. Walton, P. Maloché, A. M. Ancoin, J. H. Finnegan, J. C. Bach, and Henry Tebbe; Chas. F. Buck, City Attorney, and J. W. Gurley, Jr., late Assistant City Attorney, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said above-named appellants, as in said petition and order for an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

EDWARD C. BILLINGS, *Judge.*

48 [Endorsed:] J. D. Houston, State Tax Collector. United States circuit court, eastern district of Louisiana. No. 9277. Louisiana State Lottery Company *et al.*, appellees, *vs.* J. B. Walton *et als.*, appellants. Citation to appellee.

Marshal's Return.

Received Jun. 15, 1885, by the U. S. marshal, and on June 16th, 1883, I served a duplicate of the within citation of appeal on J. D. Houston, State Tax Collector and appellee herein, by handing the same to him in person in the city of New Orleans, eastern dist. of Louisiana.

J. R. G. PITKIN,
U. S. Marshal, East. Dist. of La.,
By E. S. CURRY,
D'y U. S. Marshal.

Personally appeared before me E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath that he served a duplicate of the within citation of appeal on the appellee herein named as set forth in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal.

Subscribed and sworn before me, June 18th, 1883.

F. A. WOOLFLEY,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

Endorsed on cover: E. Louisiana C. C. U. S. No. 296. The City of New Orleans, The Board of Assessors of the State of Louisiana in and for the Parish of Orleans, by E. T. Leche, President thereof, and the individual members of said Board, viz., E. T. Leche, J. B. Walton, P. Muloche, A. M. Ancoin, J. H. Finnegan, J. C. Bach, and Henry Tebbe; Charles F. Buck, City Attorney, and J. W. Gurley, Jr., late Assistant City Attorney, appellants, *vs.* J. D. Houston, State Tax Collector, and The Louisiana State Lottery Company. Filed 24th September, 1883.

APPENDIX TO BRIEF FOR APPELLANTS.

THE CITY OF NEW ORLEANS *et als., Appellants,*
vs.
J. D. HOUSTON, Tax Collector, and THE LOUISIANA LOTTERY COMPANY, *Appellees.*
} No. 54.

Extracts from the Constitution of Louisiana of 1879.

ARTICLE 30. No law shall be revived or amended by reference to its title, but in such cases the act revived or section as amended shall be re-enacted and published at length.

ARTICLE 207. The following property shall be exempt from taxation, and no other, viz: All public property, places of religious worship or burial, all charitable institutions, all buildings and property used exclusively for colleges or other school purposes, the real and personal estate of any public library, and that of any other literary association used by or connected with such library, all books and philosophical apparatus, and all paintings and statuary of any company or association kept in a public hall: *Provided,* The property so exempted be not used or leased for purposes of private or corporate profit or income. There shall also be exempt from taxation household property to the value of five hundred dollars. There shall also be exempt from taxation and license, for the period of ten years from the adoption of this constitution, the capital, machinery, and other property employed in the manufacture of textile fabrics, leather, shoes, harness, saddlery, hats, flour, machinery, agricultural implements, and furniture and other articles of wood, marble, or stone; soap, stationery, ink and paper, boat building, and chocolate: *Provided,* That not less than five hands are employed in any one factory.

Extracts from Constitution of Louisiana of 1868.

ARTICLE 118. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes. The General Assembly may levy an income tax upon all persons pursuing any occupation, trade, or calling. And all such persons shall obtain a license, as provided by law. All tax on incomes shall be *pro rata* on the amount of income or business done. And all deeds of sale made, or that may be made by collectors of taxes, shall be received by courts in evidence as *prima facie* valid sales. The General Assembly shall levy a poll-tax on all male inhabitants of this State over twenty-one years old for school and charitable purposes, which tax shall never exceed one dollar and fifty cents per annum.

119-260

FILED
OCT 21 1886
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1886.

No. 54.

CITY OF NEW ORLEANS

versus

JAS. D. HOUSTON, TAX COLLECTOR, LOUISIANA LOTTERY CO. ET ALS.

In Error from the United States Circuit Court, Fifth Circuit and District of Louisiana.

WALTER H. ROGERS,
City Attorney, for Plaintiff in Error.

J. Ward Gurley Jr

A. W. Hyatt, Print, 78 Camp St., N. O.—36190

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1886.

No. 54.

CITY OF NEW ORLEANS

versus

JAS. D. HOUSTON, TAX COLLECTOR, LOUISIANA LOTTERY CO. ET ALS.

In Error from the United States Circuit Court, Fifth Circuit and District of Louisiana.

The City of New Orleans prosecutes this appeal from a judgment rendered by the United States Circuit Court for the Eastern District of Louisiana, which declares null an assessment made against the share holders of the Louisiana State Lottery Company, by virtue of the provisions of the acts of the Legislature of Louisiana of 1880. It has been sought to make the City of New Orleans a party to this proceeding by service of process upon C. F. Buck, City Attorney, and J. Ward Gurley, assistant City Attorney, who, together with the other defendants in the original suit, appear to have agreed to a certain statement of facts to be found in the record. It is scarcely necessary to call the attention of the Court to the fact that the City of New Orleans could not be properly brought before the Court upon process issued through her City Attorney. Under the provisions of section 31, of Act No. 7, of the extra session of 1870 (Legislature of Louisiana), it is provided that the City Attorney shall be appointed by the Council of the City of New Orleans. His duties are defined in the following language:

"Who shall be the legal adviser of the corporation in all matters in which legal advice may be necessary, and shall represent the city in all judicial proceedings and actions to which *she may be a party*, or in which she may be interested," etc. The head of the corporation, and the only one upon whom service of the original citation or process could have been made, was the Mayor of the city, as provided for in section 8 of the same Act. There is nothing in the law as suggested to the Court to authorize any one acting as City Attorney, or assistant City Attorney, or as a board of assessors for the parish of Orleans, to bind the city by such admissions as have already been referred to and appearing in this record.

Section 7, of Act No. 77, of 1880, provides the manner of appointment of tax collectors and assessors in the City of New Orleans; for the tax collectors, determining their duties to be, "that they shall turn over monthly to the Treasurer the amount of their collections and a detailed statement thereof," and for the assessors, that they shall exercise their functions as follows: Section 16, authorizing them to fill up blank lists for assessment; section 17, authorizing them to examine the records of the Mortgage and Conveyance offices of the parish in order to ascertain the names of owners of property and the descriptions and values of the same; section 20, authorizing them to obtain the original lists for purposes of assessment; and section 21, as to filling up the assessment list. It is plain, therefore, that any act of concession or admission beyond the power thus conferred is absolutely null, and particularly as to the City of New Orleans; and for this reason, if for none other, the judgment of the lower court should be reversed.

It is contended by the defendant in error, the Louisiana State Lottery Company, that it was incorporated by virtue of the provisions of Act No. 25, of 1868, and that the clause in the fifth article, section 1 of said act, exempting it from the payment of taxes, constituted a contract between the Lottery Company and the State of Louisiana, and, consequently, the City of

New Orleans. It is further contended that this act is given recognition by the provisions of Article 167 of the Constitution of Louisiana, adopted in 1879. It is a mistake to say that Article 167 of the Constitution of 1879 was enacted in aid of the original act of incorporation in 1868. This act of 1868 was repealed by Act No. 44, of 1879, approved March 27th, which abolished the Lonisiana State Lottery Company and prohibited all lotteries in the State of Louisiana.

Whatever rights, therefore, existed, as between the Louisiana State Lottery Company and the State of Louisiana, even if a contract could at any time be considered as resulting from the original act, were absolutely repealed by Act No. 44, of 1879. We must therefore regard the provision of the Constitution of 1879, Article 167, as an original act; in so far as the power vested in the Constitutional Convention to create a corporation, it simply created the Louisiana State Lottery Company from that date, under the terms and conditions as expressed in that article, and only in that article.

The provisions in regard to lotteries, as found in that article, are general, conferring power upon the Legislature to grant lottery charters or privileges on condition that they pay not less than forty thousand dollars per annum in money into the treasury of the State, and provided that all such lottery charters and privileges expire on the 1st of January, 1895, from which time all lotteries are prohibited in the State.

The forty thousand dollars per annum provided by law to be paid by the Louisiana State Lottery Company, created in 1868, was by this section awarded to the Charity Hospital, and the charter of said Company is recognized as a contract binding upon the State for the period therein specified, except its monopoly clause, which is hereby abrogated; and all laws contrary to the provisions of this article are declared null and void.

It is difficult to understand how a constitutional convention, providing a Constitution for the State, could establish and enact a charter, or recognize as existing a charter which had been re-

pealed in 1879, and which had never been re-enacted. Regarding the Article 167 of the Constitution as an entirely new enactment, and reading as we find it printed in that instrument, the only contract between the State of Louisiana and the Lottery Company, if any at all, was the contract that it should pay not less than forty thousand dollars a year to the State Treasury in money; that its charter should expire on the first of January, 1895, and that the forty thousand dollars thus paid should belong to the Charity Hospital in the City of New Orleans; and that this charter should exist without any monopoly features whatsoever, to be evidenced by a written renunciation of such features possessed by the Lottery Company, and filed in the office of the Secretary of State.

It has been held by the Supreme Court of this State that constitutional provisions are not self-operative. It is impossible to take any other view of the intent of the framers of the Constitution of the State when we examine Article 30 of the same instrument, which provides that no law ever shall be revived or amended by reference to its title, but in such case the entire act shall be re-enacted and published at length. Certainly it was known that Act No. 25, of 1868, had been abrogated by Act No. 44, of 1879, and if it had been the intention of the Constitutional Convention to revive that law as it then existed, they would have followed the provisions of Article 30 of the Constitution, which required that the entire act should be published and re-enacted at lenght. It is therefore more correct to say that the Louisiana State Lottery Company exists not by virtue of Act No. 25, of 1868, but by virtue of the provisions of Article 167, of the Constitution of 1879, and it must be held in all its relations to the city and State, according to the strict terms of that provision. In it there is no reference to exemption from taxation whatever. Art. 207 of the same specially declares what property shall be exempt from taxation and *no other.*

These propositions are submitted without reference to or criticism of any decision of the Supreme Court of Louisiana

prior to 1879; for if the view expressed above as to the rehabilitation of the Lottery Company in 1879 be correct, such decisions have no application whatever, and equally, if the propositions submitted be true, the judgment of the lower court was erroneous, because the attack of the Lottery Company upon the legality of the assessment was on the ground of exemption from taxation through legislative enactment in 1868. Aside from this, if the court should be of opinion that Act 25, of 1868, was still in force when the present suit was brought in 1881 on an assessment made in 1880, it is urged that the exemption could not apply to the share holders of the Louisiana State Lottery Company. The Act of 1868 simply exempted the Louisiana State Lottery Company from taxation on payment of its tax of forty thousand dollars, whereas Section 48, of Act No. 77, of 1880, declares that no assessment shall hereafter be made under that name as heretofore of the capital stock of any national bank, state bank, banking company, banking firm or banking association, or of any corporation, company, firm or association, whose capital stock is represented by shares, but the actual shares shall be assessed to the share holders who appear as such upon the books, thus providing that individual share holders are taxable on the property they hold as represented by their certificates as shares of stock.

A tax on the shareholders in a corporation is a different thing from a tax of a corporation itself upon its stock, and may be laid irrespective of any tax of the corporation. Cooley on Taxation, 169; 3 Wallace, 581, 584; 1 Cushing, 142; 6 Wallace, 611; 9 Wallace, 353, 468; 2 Jones' Equity, 396; 26 New Jersey, 181; 47 Penn. 106; 49 Indiana, 526; 9 Georgia, 490; 21 New York, 439; 39 Illinois, 130, 141; 15 Indiana, 150; 37 Maine, 444; 22 Wallace, 215, 527; 94 U. S. 527; 105 U. S. 305.

It is also a well-settled principle of law that the intent of the law-maker to grant the exemption claimed must be clear beyond reasonable doubt. 20 Wallace, 61; 6 Wallace, 606; 10

Howard, 376, 393; 4 Peters, 561; 1 Black, 436; 16 Howard, 416; 18 Wallace, 224; 22 Wallace, 215, 527.

The act No. 44, of 1879, appears only in bound volumes of Acts for 1880, and is therefore annexed to this brief. This act was reviewed by the Supreme Court of Louisiana, in case of Carcass vs. Judge, 32 La. An. p. 721.

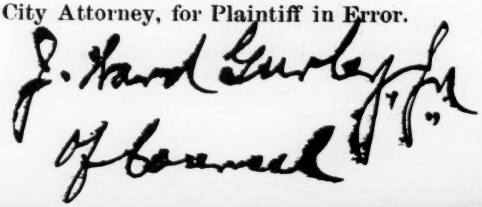
It was held that the intention of the Convention of 1879 was clearly to repeal that portion of the act which contemplated the destruction of the corporation * * and to authorize the further existence up to 1895.

The question of the effect of Art. 30 of the Constitution was not before the Court, and hence, even in absence of reference to that authority, the Court was careful not to say that the act of 1868 was re-enacted by the Convention—and to be still more emphatic, we find on page 724 of this decision the declaration, "Article 167 formally recognizes the Louisiana State Lottery as an institution chartered by the State, and determines the term of its existence, but *without* any rights of *monopoly*."

In other words, the only legal life that now exists in the Lottery Company springs from Art. 167 of the Constitution and in this we find no exemption from taxation whatever. On the contrary, this instrument in Art. 207 sets forth very clearly only the property to be exempted from taxation. It is impossible to see what other construction can be given to it, particularly in this very case, when the Supreme Court declare this payment of forty thousand dollars to be a LICENSE.

It is respectfully asked that the judgment appealed from be reversed.

WALTER H. ROGERS,
City Attorney, for Plaintiff in Error.



APPENDIX.

No. 44.] AN ACT

To repeal Act No. 25 of the Legislature of 1868, entitled "An act to increase the revenues of the State and to authorize the incorporation and establishment of the Louisiana State Lottery Company, and to repeal certain acts now in force;" also to abolish the Louisiana State Lottery Company; also to repeal act No. 9 of the Legislature of 1874, entitled "An act relative to the unlicensed sale of Lottery tickets in the city of New Orleans, and conferring on the police courts the power to suppress the same;" also to repeal act No 10 of the Legislature of 1874, entitled "An act relative to crimes and offenses; to declare the sale of illegal lottery tickets, or the drawing of any illegal lottery a misdemeanor, and to provide for the punishment of the same, and to regulate the evidence to be received upon the trial of such offenses;" also to prohibit lotteries and the sale of lottery tickets; to make it a misdemeanor to set up or promote lotteries or to sell lottery tickets, or aid therein, directly or indirectly; to provide punishment therefor, and to regulate the evidence to be received upon the trial of such offenses.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the following acts, to-wit: "An act entitled an act to increase the revenues of the State and to authorize the incorporation and establishment of the Louisiana State Lottery Company, and to repeal certain acts now in force," being act No. 25 passed at the first session of the First Legislature begun and held on the 29th day of June, 1868; also an act entitled "An act relative to the unlicensed sale of lottery tickets in the city of New Orleans, and conferring on the police courts the power to suppress the same," being act No 9 of the second session of the Third Legislature, begun and held on the 5th day of January, 1874; and an act entitled "An act relative to crimes and offenses; to declare the sale of illegal lottery tickets, or the drawing of any illegal lottery, a misdemeanor, and to provide for the punishment of the same, and to regulate the evidence to be received upon the trial of such offenses," and any and all other laws upon the same subject matter passed in the interest of the Louisiana State Lottery Company be and the same are hereby repealed.

SEC. 2. *Be it further enacted, etc.*, That the Louisiana State Lottery Company be and the same is hereby abolished and prohibited from drawing any and all lotteries, or selling lottery tickets either in its corporate capacity or through its officers, directors, stockholders, members or agents, directly or indirectly.

SEC. 3. *Be it further enacted, etc.*, That whoever shall sell, barter, exchange give, or otherwise dispose of or offer to sell, barter, exchange, give, or otherwise dispose of, directly or indirectly, personally or through an agent or agents, either for himself or others, or shall draw any lottery or have any connection with or interest in the drawing of any lottery in this State, or shall have in his possession within this State, with intent to sell or offer for sale, or with intent to barter or exchange, or give or otherwise dispose of, any lottery tickets or shares, or fractional part thereof, or lottery policy or combination, device, or any other writing, certificate, or token, intended or purporting to entitle the holder or bearer, or any other person, to an

prize or share, or interest in any prize drawn or to be drawn in any lottery, shall be condemned for each offense to, and shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall suffer imprisonment in the parish prison or jail, as the case may be, not exceeding sixty days, or fined not exceeding one hundred dollars, or both, at the discretion of the court; one-half of such fine to go to the informer and the other half to the city of New Orleans, or the parish in which said offense is committed, as the case may be.

SEC. 4. *Be it further enacted, etc.,* That every person who shall set up or promote any lottery in this State, or shall assist or be interested therein, or shall aid by printing or writing, or shall in any way be concerned in setting up, promoting, managing or drawing of any lottery, or shall in any house, shop or building owned or occupied by him or under his control, knowingly permit the setting up, managing or drawing any such lottery, or the sale of any lottery tickets or share of a ticket, or any other writing, certificate, bill, token, or other device, purporting or intended to entitle the holder, bearer, or any other person, to any prize, or share of or interest in any prize to be drawn in a lottery, shall be guilty of a misdemeanor, and on conviction shall suffer imprisonment not to exceed sixty days, or a fine not exceeding one hundred dollars, or both, at the discretion of the court, for each offense; one-half of such fine to go to the informer and the other half to the parish or the city of New Orleans, as the case may be, in which such offense is committed.

SEC. 5. *Be it further enacted, etc.,* That it shall not be necessary, in the trial of any person or persons for the offense or offenses denounced by this act, to prove the existence of any lottery in which any ticket, share, or part of a ticket, device, token, or certificate thereof purports to have been issued, or the actual signing of any such ticket or share, or device, token, or certificate thereof, nor that any such ticket, or share, or device, token, or certificate thereof was signed or issued by authority of any manager of such lottery, or by any person assuming to have such authority, but in all cases it shall be presumed that such ticket, share or interest, device, token, or certificate thereof, was signed and issued accordsng to the purport thereof by proper authority.

SEC. 6. *Be it further enacted, etc.,* That this act shall take effect from and after the thirty-first day of March, A. D. (1879) eighteen hundred and seventy-nine.

(Signed) JOHN C. MONCURE,
Speaker of the House of Representatives.

(Signed) LOUIS A. WILTZ,
Lieutenant Governor and President of the Senate.

Approved March 27, 1879.

(Signed) FRANCIS T. NICHOLLS,
Governor of the State of Louisiana.

A true copy:

WILL A. STRONG,
Secretary of State.